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No. 80-2175

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONTROL DATA CORPORATION, *et al., Petitioners,*

v.

MALCOLM BALDRIGE, *et al., Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

Petitioners are the principal suppliers of computers to the federal government other than IBM. They sought judicial review of Agency action by the Secretary of Commerce in promulgating standards requiring that certain IBM specifications be used in virtually all computer equipment supplied to federal agencies. The Secretary's action was taken under statutes designed to promote competition for federal computer procurements. Petitioners alleged in their complaints that the Secretary's action would bar them from the federal computer market for a period of years and thus cause them to suffer direct competitive and economic injury. The courts held that petitioners could not obtain judicial review of the Secretary's action because they were not intended beneficiaries of the statutes in question and, therefore, were not within the "zone of interests" of those statutes. The court below recognized that, because petitioners are the parties most directly injured by the Secretary's action, denying them standing would insulate that action from judicial review.

The questions presented are:

1. Whether petitioners, in order to have standing under the "zone of interests" standing test, must be intended beneficiaries of the statutes in question.

2. Whether Agency action alleged to be arbitrary, capricious, and in excess of statutory authority, can be insulated from judicial review by the application of prudential limitations on standing to deny judicial review to the only parties injured by that action.

PARTIES

The parties involved in this petition are Control Data Corporation, Honeywell Information Systems Inc., and Sperry Corporation, petitioners; and Malcolm Baldrige (in his capacity as Secretary of Commerce), David Stockman (in his capacity as Director of the Office of Management and Budget), and Gerald Carmen (in his capacity as Administrator of the General Services Administration), respondents. Burroughs Corporation was an appellant in the court below but does not join in this petition for a writ of certiorari. The parents, subsidiaries and affiliates of petitioners are set forth in Appendix F, *infra* pp. 97a-100a.

The petitioners, Control Data Corporation, Honeywell Information Systems Inc., and Sperry Corporation, pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the District of Columbia Circuit in this case, entered on March 25, 1981.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. _____

CONTROL DATA CORPORATION, *et al.*, *Petitioners,*

v.

MALCOLM BALDRIGE, *et al.*, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals is set forth in Appendix A, *infra* pp. 1a-30a; it has not been officially reported. The opinion of the district court is reported at 85 F.R.D. 339 (D.D.C. 1980). It is set out in Appendix C, *infra* pp. 33a-40a.

JURISIDICTION

The judgment of the court of appeals, which was entered on March 25, 1981, is set out in Appendix B, *infra* pp. 31a-32a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The statutes and regulations pertinent to this case are as follows:

Administrative Procedure Act, 5 U.S.C. §§ 553, 702, 706 (1976)

Brooks Act, Pub. L. No. 89-306, 79 Stat. 1127, 40 U.S.C. § 759 (1976)

Federal Property and Administrative Services Act of 1949, ch. 288, 63 Stat. 377 (codified in scattered sections of 40 and 41 U.S.C.), 40 U.S.C. § 471 (1976); 41 U.S.C. §§ 252, 253 (1976)

Channel Level Power Control Interface Standard, 44 Fed. Reg. 10,100 (February 16, 1979)

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Executive Order No. 11717, § 2, 38 Fed. Reg. 12,315 (1973), reprinted in 31 U.S.C. § 16 (1976).

Relevant portions of the statutes and regulations at issue are set forth in Appendix D, *infra* pp. 41a-80a.

STATEMENT

This case arises out of petitioners' efforts to obtain judicial review of actions taken by the Secretary of Commerce (the "Secretary") in promulgating four computer standards that establish mandatory specifications for all major computer systems purchased by federal agencies. The standards in question "define the mechanical, electrical and functional interface specifications for connecting computer peripheral equipment, such as magnetic tape and disc devices, as a part of medium and large scale automatic data processing (ADP) systems."[1] The

[1] 44 Fed. Reg. 10,098 (February 16, 1979), App. 41a. There are exclusion provisions for the standards. These apply only

specifications established as mandatory by the Secretary were developed and copyrighted by International Business Machines Corporation ("IBM").

In promulgating the challenged standards, the Secretary purported to act pursuant to the Brooks Act, Pub. L. No. 89-306, 79 Stat. 1127, codified as 40 U.S.C. §759.[2] Under the Brooks Act, the Secretary is authorized to provide "scientific and technological advisory services relating to automatic data processing and related systems," and "to make appropriate recommendations to the President relating to the establishment of uniform Federal automatic data processing standards."[3] The Secretary's action in making standards is subject to fiscal and policy oversight by the Office of Management and Budget and to final implementation by the General Services Administration.

Petitioners alleged in their complaints below, and the Government has conceded, that petitioners would suffer significant injury to their ability to compete in the federal marketplace as a direct result of the Secretary's action. Petitioners' systems do not utilize the IBM specifications mandated by the challenged standards. As a practical matter, therefore, the standards bar petitioners from the federal computer marketplace until their

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to small-scale systems, and therefore do not alleviate or mitigate the injury suffered by petitioners. See 44 Fed. Reg. 16,466 (March 19, 1979), App. 64a.

[2] This was an amendment to the Federal Property and Administrative Services Act of 1949, ch. 288, 63 Stat. 377, which is codified in scattered sections of Titles 40 and 41 of the United States Code (hereinafter "FPAS").

[3] The President's authority under the Brooks Act to approve standards was transferred to the Secretary of Commerce in Executive Order No. 11717, §2, 38 Fed. Reg. 12,315 (1973), reprinted in 31 U.S.C. §16 (1976), App. 79a.

systems can be brought into compliance, which petitioners alleged would take several years and require expenditure of millions of dollars.

Even after their systems are brought into compliance with the standards, petitioners will suffer permanent competitive harm. The modifications necessary to achieve compliance will reduce the performance capabilities of petitioners' computer systems, making those systems less competitive with systems that utilize the IBM specifications.

Since petitioners are IBM's principal competitors, impairing their ability to compete will necessarily deprive federal agencies of the benefits of full competition for computer acquisitions.

Petitioners filed actions in the United States District Court for the District of Columbia seeking judicial review, under sections 702 and 706 of the Administrative Procedure Act ("APA"), of the Secretary's action in issuing the standards. The district court had jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 702.

Petitioners alleged in their complaints that the Secretary's action in promulgating the standards was unlawful and that the standards should accordingly be set aside under section 706 of the APA. Their complaints set forth three basic grounds for setting aside the standards.

First, the Secretary exceeded the statutory authority granted by the Brooks Act in that he purported to exercise powers that were specifically delegated to the Director of the Office of Management and Budget and the Administrator of General Services and violated the prohibition of the Brooks Act against interference with the

freedom of federal agencies to determine their individual computer requirements.[4]

Second, the Secretary's decision was arbitrary and capricious because there was no support in the administrative record for the Secretary's conclusion that the standards would not impair competition. In reaching this conclusion, the Secretary relied upon data from two experimental studies that were never disclosed for public comment prior to the Secretary's decision.[5]

Third, although the standards were adopted pursuant to a notice and comment rulemaking under section 553 of the APA, the Secretary failed to provide a meaningful opportunity for public comment by failing to disclose significant extra-record material upon which he relied, and by engaging in undisclosed *ex parte* communications during the pendency of the rulemaking.[6]

Petitioners' actions below did not seek judicial intervention in the day-to-day decisions of executive agencies regarding what they want to buy or the terms of their purchases. Indeed, as noted, the complaints challenged the Secretary's interference with the discretion of procuring agencies to determine their individual computer needs.

The Decisions of the Courts Below

On January 20, 1980, the district court dismissed the complaints on the ground that petitioners lacked standing to obtain judicial review. The Government had conceded that petitioners would be injured by the

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[4] See complaint of petitioner Honeywell Information Systems Inc., (set out in Appendix E, *infra* pp. 81a-96a), App. 93a-94a.

[5] Id., App. 94a-95a.

[6] Id., App. 94a-95a.

challenged standards and, indeed, admitted that the standards were intended to cause petitioners to suffer injury.[7] Accordingly, the court held that the constitutional requirement of a case or controversy was satisfied. The district court further acknowledged that the petitioners were logical parties to challenge the Secretary's action. However, the district court dismissed the complaints as a prudential matter, holding that petitioners lacked standing because they were not arguably within the zone of interests protected by the Brooks Act. Petitioners filed a timely notice of appeal.[8]

On March 25, 1981, the United States Court of Appeals for the District of Columbia Circuit affirmed the judgment of the district court. The court of appeals examined the language and legislative history of the Brooks Act and the FPAS and concluded that those statutes were intended to enhance competition for the federal government's purchases of computer equipment. The court also acknowleged petitioners' allegations that the challenged rules were anticompetitive and that petitioners would suffer direct injury to their interest in competition as a result of the Secretary's action.

Nevertheless, the court of appeals held that under the "zone of interests" test established by this Court in

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[7] Counsel for the Government at oral argument was quite candid on the point:

> We do not deny that plaintiffs will suffer injury in fact. Indeed, we have made the point that that is the very object of these regulations. Transcript of January 3, 1980 Proceedings, at 8. (Set out in Appendix G, *infra*, pp. 101-102), App. 102.

[8] Thereafter, petitioners moved the district court to stay the effective date of the IBM specifications pending appellate review. That motion was denied by the district court, but granted by the court of appeals on June 24, 1980. On July 2, 1980, this Court vacated the stay granted by the court of appeals.

Association of Data Processing Service Organizations, Inc. v. *Camp*, 397 U.S. 150, standing to seek judicial review of agency action was limited to persons intended by Congress to be beneficiaries of the statute under which the challenged action was taken. Because the Brooks Act and FPAS did not evidence an intent to benefit computer companies, petitioners were held to lack standing. The court of appeals expressly recognized that the effect of its ruling was to insulate the Secretary's action from judicial review.

REASONS FOR GRANTING THE WRIT

1. The Requirements For Standing To Obtain Judicial Review Of Federal Agency Action Need Clarification By This Court In Order To Eliminate Confusion And Inconsistency In The Lower Courts.

In *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 153, and its progeny, this Court stated that the relevant inquiry on the issue of standing is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *See also Investment Company Institute* v. *Camp*, 401 U.S. 617; *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45; *Barlow* v. *Collins*, 397 U.S. 159.

In the decade since the appearance of those decisions, no further guidance as to the proper application of that general test has been provided by this Court. As a result, there has been a lengthy succession of lower court decisions reaching inconsistent, conflicting, and frequently illogical conclusions about the requirements for standing and the application of the "zone of interests" test.

This extraordinary state of disarray among the lower federal courts was set out strikingly by the court below in the following passage (App. 21a):

> A survey of this law reveals, however, more variety than uniformity among the approaches to the zone test. Some courts, reacting strongly to the Supreme Court's vague formulation of the test, have expressed disagreement with the standard,[16] clearly misapplied it,[17] or virtually ignored it.[18]

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[16] *See, e.g., Park View Heights Corp.* v. *City of Black Jack,* 467 F.2d 1208 (8th Cir. 1972). In this case the court recorded its "preference for simplifying the 'law on standing.' We think that all that is required for a plaintiff to have standing to sue for a constitutional or statutory violation is a showing of 'injury in fact.' " *Id.* at 1212 n.4.

[17] *See Upper Pecos Ass'n* v. *Stans,* 452 F.2d 1233, 1235 (10th Cir. 1971), *vacated on other grounds,* 409 U.S. 1021 (1972), *and Izaak Walton League of America* v. *St. Clair,* 313 F. Supp. 1312, 1316-17 (D. Minn. 1970). *See also Gibson & Perin Co.* v. *City of Cincinnati,* 480 F.2d 936 (6th Cir.), *cert. denied,* 414 U.S. 1068 (1973).

[18] *See, e.g., Florida* v. *Weinberger,* 492 F.2d 488, 494 (5th Cir. 1974) (grant of standing to the state plaintiff solely on the basis of its "clear interest . . . in the manner in which the Medicaid program is administered vis-a-vis its citizens and in being spared the reconstitution of its statutory program. . . ."); *William F. Wilke, Inc.* v. *Department of Army of United States,* 485 F.2d 180 (4th Cir. 1973) (grant of standing to a disappointed bidder for a government contract without mentioning the zone standard).

The confusion described by the court of appeals creates the disturbing prospect that access to the courts

for persons aggrieved by agency action may not be granted even-handedly throughout the country. Moreover, the uncertainty over standing has led and will continue to lead to a proliferation of preliminary motions and appeals, which in turn increase court congestion and reduce the judiciary's ability to deal with the substantive merits of legal disputes in an efficient manner.[9]

2. The Court Of Appeals Plainly Indicated The Need For Clarification Of The Zone Of Interests Standing Test By This Court.

The court below made it clear that it had great difficulty in divining the proper analytical approach to standing under the "zone of interests" test. For example, the court referred to the test as "confusing" (App. 29a), and further stated (App. 13a):

> The test's amorphous nature . . . makes application difficult and careful evaluation impossible absent some refinement.

In discussing the origins of the "zone of interests" test in *Data Processing*, 397 U.S. 150, and its companion cases, the court below remarked:

> This new test was starkly stated . . . without accompanying expression of the methods to be utilized in its application. Moreover, the Court's own applica-

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[9] These problems are not solved by the Court's recent decisions in *California* v. *Sierra Club*, _____ U.S. _____, and *Universities Research Ass'n* v. *Coutu*, _____ U.S. _____. In each of those cases the plaintiff sought to enforce the provisions of a federal statute against private third parties. Those decisions did not involve standing, but rather addressed the question whether private plaintiffs had an implied cause of action against third parties under the relevant statutes. The opinions of this Court, therefore, focused upon application of the criteria for finding an implied private right of action set forth in *Cort* v. *Ash*, 422 U.S. 66.

> tions of the fledgling standard were generally conclusory in nature, and consequently failed to provide the desired clarification.
>
> Despite the difficulties engendered by this lack of guidance, the Court has not attempted to develop . . . a more mature zone of interests standard.

App. 16a.

As previously noted, the court below unsuccessfully sought guidance from the decisions of other courts, finding that other courts had disavowed, misapplied or ignored the "zone of interests" test. App. 21a. The court also noted the view of one prominent commentator that this Court's recent decisions reflect the Court's "implicit abandonment" of the test.[10] While acknowledging confusion over proper application of the "zone of interests" test, and noting the considerable doubt over its continued vitality, the court below attempted to apply the test, and in so doing denied petitioners standing.

3. The Decision Of The Court Of Appeals Is Essentially In Conflict With Decisions Of This Court And Would Immunize Unlawful And Far-Reaching Agency Action From Judicial Review.

Simply stated, the court below held that the federal courts would decline to exercise their constitutional and statutory jurisdiction over a challenge to federal computer standards because petitioners, the most logical plaintiffs, were not intended beneficiaries of the statutes under which the standards purportedly were issued. The court reached this ruling even though petitioners were the intended victims of the challenged agency action and despite the fact that a principal allegation of petitioners'

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[10] App. 16a., *citing* K. Davis, *Administrative Law Treatise*, § 22.02-11, at 509 (Supp. 1976).

complaints was that the Secretary's action was not authorized by, and was in violation of, the statute in question.

In denying standing to petitioners, the court below acknowledged that petitioners had satisfied constitutional standing requirements by demonstrating injury in fact by virtue of harm to their competitive position. App. 12a. The court further determined that the relevant Acts, the Federal Property and Administrative Services Act as amended by the Brooks Act, share the purpose of promoting competition. App. 24a-25a, 27a-28a n.26. The court held that petitioners nevertheless lacked standing because the court could find no evidence, in the language of the statutes or their legislative history, of a congressional intent to protect or benefit the petitioners. App. 24a.

The assumption of the court below that one must be an intended beneficiary of the statute at issue to assert an interest arguably within the "zone of interests" of that statute is in conflict with the essential basis of decisions by this Court.

In *Data Processing,* 397 U.S. 150, this Court held that data processing service organizations who alleged competitive harm had standing to challenge decisions by the Comptroller of the Currency, under the Bank Services Corporation Act,[11] that allowed banks to provide data processing services in competition with the plaintiffs. In *Arnold Tours* v. *Camp,* 400 U.S. 45, this Court ruled *per curiam* that travel agents, as injured competitors, had standing under the Bank Service Corporation Act to obtain judicial review of a decision by the Comptroller of the Currency permitting banks to offer travel services to bank customers. Finally, in *Investment*

[11] 76 Stat. 1132, 12 U.S.C. § 1864 (1976).

Company Institute, 401 U.S. 617, investment companies were found to have standing to challenge a decision by the Comptroller, under the Glass-Steagall Act,[12] that allowed banks to engage in the investment management business. This Court ruled that, by alleging that they would suffer injury to their competitive position, the investment companies asserted injury to an interest that was arguably within the zone of interests of the statute at issue.

In none of these cases was the complainant an intended beneficiary of the Act in question.[13] Indeed, in *Investment Company Institute,* this Court and the court of appeals,[14] after reviewing the language and legislative history of the Glass-Steagall Act, determined that Congress' sole interest in enacting that legislation was to preserve public confidence in banks and to protect bank customers from the type of unduly speculative investment activities that impaired the financial stability of banks before the Depression. *Id.* at 629-34. There was no evidence that in so doing Congress intended to protect commercial entities that might suffer from competition by banks.

Thus, if the intended beneficiary analysis of the court below were applied to the complainants in the

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[12] 12 U.S.C. §24 (1976).

[13] This Court's decision in *Barlow* v. *Collins,* 397 U.S. 159, does not detract from this analysis. In *Barlow* the Court held that an intended beneficiary clearly had standing under the "zone of interests" analysis, not that the plaintiff must be an intended beneficiary. *Id.* at 164-65.

[14] *National Ass'n of Securities Dealers, Inc.* v. *SEC,* 420 F.2d 83 (D.C. Cir. 1969) (per curiam). *See id.* at 89, 96 (Bazelon, J., concurring); 107 (Burger and Miller, J.J., concurring).

Data Processing line of cases, not one of those parties would have had standing.[15]

In essence, by requiring a complainant to be an intended beneficiary in order to obtain standing under a relevant statute, the court below revives the "legal rights" test as the basis of standing. Under that test, one does not have standing to challenge agency action unless that action invades some legally protected right (*e.g.*, one founded on a statute which confers some privilege). *See Tennessee Electric Power Co.* v. *TVA*, 306 U.S. 118. This approach to standing, which was followed before enactment of the Administrative Procedure Act, was explicitly disavowed by this Court in *Data Processing*, 397 U.S. at 153. The decision of the court below, therefore, cannot be reconciled with the decisions of this Court.

Review of the decision of the court below is particularly appropriate here because that decision effectively insulates from judicial scrutiny the Secretary's action in this case, as well as all future actions by the Secretary in carrying out the far-reaching computer standards program. Petitioners, as the principal competitors of IBM for federal computer procurements, are the most directly affected parties, and indeed the intended victims, of the Secretary's actions in promulgating the standards. If petitioners are found to be lacking standing, no one will

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[15] Similarly, the distinction made by the court below of the competitive interest asserted by petitioners here (protection of competitive position and continued business relations with the Government), from the interest in competition underlying the Brooks Act (lower prices for the Government) cannot be reconciled with the *Data Processing* line of cases. In each of those cases the plaintiffs asserted an economic self-interest in competition, which was not the direct concern of Congress in enacting legislation limiting the activities of banks. Each plaintiff was found to have standing on the basis of that economic self-interest. There is no reason for a different result here.

be able to obtain judicial review of the Secretary's action. This result would not comport with this Court's decision in *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, which held that

> only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review.

387 U.S. at 141, *citing Rusk* v. *Cort,* 369 U.S. 367, 380.

The lower court's decision is disturbing not only because it forecloses judicial review of illegal agency action harming these petitioners, but also because the principles established in the lower court's ruling, if applied in other cases, would serve to immunize a broad range of agency actions from judicial scrutiny.[16] This immunity is of neither constitutional nor legislative origin, and would stand as one of the few exceptions to the otherwise "unflagging obligation" of federal courts to exercise jurisdiction over cases and controversies within their constitutional and statutory jurisdiction. *Colorado River Water Conservation District* v. *United States,* 424 U.S. 800, 817.

The court below has adopted an overly restrictive interpretation of this Court's "zone of interests" test for standing, thus immunizing the Secretary's actions from judicial review. This Court should review the decision in order that the correct test for standing will be established and applied.

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[16] For a number of reasons, it is likely that the decision in this case will become a highly influential precedent. A disproportionate share of administrative litigation is brought in the federal courts of the District of Columbia, and the decision below can be expected to be followed in those courts.

CONCLUSION

As the opinion below makes clear, the guidance of this Court is essential to resolve the disarray among the lower federal courts with regard to the non-constitutional requirements for standing to challenge unlawful agency action. The decision below effectively immunizes the Secretary's action from judicial review. This ruling is fundamentally inconsistent with this Court's decisions, and unjustly restricts access to federal courts by persons suffering direct injury as a result of unlawful agency action.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 23, 1981

APPENDIX A
OPINION OF THE COURT OF APPEALS

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1143

CONTROL DATA CORPORATION, APPELLANT

v.

MALCOLM BALDRIDGE,
SECRETARY OF COMMERCE, *et al.*

(D.C. Civil No. 79-2716)

No. 80-1152

SPERRY CORPORATION, APPELLANT

v.

MALCOLM BALDRIDGE,
SECRETARY OF COMMERCE

(D.C. Civil No. 79-2790)

No. 80-1165

HONEYWELL INFORMATION SYSTEMS, INC., APPELLANT

v.

MALCOLM BALDRIDGE,
SECRETARY OF COMMERCE

(D.C. Civil No. 79-2715)

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 80-1176

BURROUGHS CORPORATION, APPELLANT

v.

MALCOLM BALDRIDGE,
SECRETARY OF COMMERCE, *et al.*

(D.C. Civil No. 79-2717)

Appeals from the United States District Court
for the District of Columbia

Argued October 21, 1980
Decided March 25, 1981

Judgment entered this date

Eldon H. Crowell, with whom *George D. Ruttinger* and *Peter F. Garvin, III*, were on the brief, for appellant Control Data Corporation. *W. Stanfield Johnson* and *Robert O. Davis* also entered appearances for appellant Control Data Corporation.

James R. McAlee and *Hadrian R. Katz* were on the brief for appellant Sperry Corporation.

Milton Eisenberg, *Henry A. Hubschman*, *John B. Corr*, and *Richard B. Berryman* were on the brief for appellant Honeywell Information Systems, Inc.

George L. Christopher and *Charles Lee Eisen* were on the brief for appellant Burroughs Corporation.

Mark N. Mutterperl, Attorney, U.S. Department of Justice, with whom *Alice Daniel*, Assistant Attorney General, *Charles F.C. Ruff*, United States Attorney, and *Leonard Schaitman*, Attorney, U.S. Department of Justice, were on the brief, for appellees.

Before TAMM and EDWARDS, *Circuit Judges*, and LLOYD F. MACMAHON,* *U.S. District Judge* for the Southern District of New York.

Opinion for the court filed by *Circuit Judge* TAMM.

TAMM, *Circuit Judge*: Appellants, major manufacturers and suppliers of computer systems and equipment for the government, claim the right to challenge rules promulgated by the Secretary of Commerce. These rules, issued pursuant to the Secretary's authority under the Brooks Act, establish mandatory specifications governing virtually all procurements of computer equipment by the federal government. Appellants attacked these rules in the United States District Court for the District of Columbia, alleging that the Secretary's decision was arbitrary and capricious, that the Secretary exceeded his statutory authority, and that the administrative proceeding from which the rules emerged violated the Administrative Procedure Act. United States District Judge Penn refused to reach these contentions, however, ruling that appellants lacked standing to prosecute their claims. We find that a principled application of the amorphous "zone of interests" test compels this result and, accordingly, affirm the district court's decision.

I. BACKGROUND

A. *Legislative Concern: ADP Procurement and the Need for Standards*

In 1965, recognizing that increasing governmental expenditures for automatic data processing (ADP) equipment required immediate legislative attention, Congress passed an amendment to the Federal Property and Administrative Services Act of 1949. Ch. 288, 63 Stat. 377 (codified in scattered sections of 40 & 41 U.S.C.). This amendment, known

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*Sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

as the Brooks Act,[1] had as its avowed objective "the economic and efficient purchase, lease, maintenance, operation, and utilization of automatic data processing equipment by Federal departments and agencies." 111 CONG. REC. 22,823 (1965) (remarks of Rep. Brooks). To achieve this objective, Congress attempted to create a "coordinated management program through which the Government [could] keep track of its . . . investment and more wisely predict and control its future expenditures." *Id.* Pursuant to this program, management responsibilities were allocated among the General Services Administration, the Bureau of the Budget, and the Department of Commerce.

Under this allocation, the Secretary of Commerce was authorized to "undertake necessary research and to provide scientific and technological advisory services relating to the use of automatic data processing in the Government." *Id.* at 22,824 (remarks of Rep. Reid). The Secretary also assumed the responsibility for submission of recommendations to the President regarding the promulgation of uniform federal standards in the field.[2] This latter responsibili-

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[1] The Brooks Act provides in pertinent part:

> The Secretary of Commerce is authorized (1) to provide agencies, and the Administrator of General Services in the exercise of the authority delegated in this section, with scientific and technological advisory services relating to automatic data processing and related systems, and (2) to make appropriate recommendations to the President relating to the establishment of uniform Federal automatic data processing standards. The Secretary of Commerce is authorized to undertake the necessary research in the sciences and technologies of automatic data processing computer and related systems, as may be required under provisions of this subsection.

40 U.S.C. § 759(f) (1976).

[2] The development of recommended standards within the Department was entrusted to the National Bureau of Standards

ty reflected clearly Congress's perception that the creation of standards would permit greater compatability among systems, foster competition, and thereby promote more effectively the goal of efficient management of the government's ADP resources. *Automatic Data Processing Equipment: Hearings on H.R. 4845 Before the Subcomm. on Government Activities of the House Comm. on Government Operations*, 89th Cong., 1st Sess. 158–59 (1965) (statements of Rep. Brooks and Dr. William Eaton).

Since the passage of the Act, Congress has not only maintained this emphasis but has in addition more sharply defined its focus. The House Committee on Government Operations, for example, commented on the overall need for standards in its 1976 oversight report regarding the growing trend of noncompetitive ADP procurements by federal agencies. Urging that corrective measures be taken, the Committee suggested the following:

> First and foremost is the development of meaningful hardware and software standards. . . . At the hearings, GAO expressed serious concern about the lack of progress being made by NBS in the development of standards. This concern of GAO was prompted, in large part, by its recognition that standards are essential to the achievement of full competition and to the saving of large sums of money by the Government. To date, NBS has only developed to a limited extent standards necessary to fully implement the Act, even though it acknowledged at its hearings that lack of standards seriously impedes effective competition. As the Computer Industry Association testified at the hearings, NBS has developed no

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(NBS). Automatic Data Processing Equipment: Hearings on H.R. 4845 Before the Subcomm. on Government Activities of the Comm. on Government Operations, 89th Cong., 1st Sess. 154 (1965) (statement of Dr. William Eaton), quoting Circular A–71, para. 5(d) (Bureau of the Budget) (March 6, 1965).

> meaningful hardware standards and only a relatively few software standards. . . .

H.R. REP. NO. 1746, 94th Cong., 2d Sess. 7 (1976).

Beyond this reiteration of the benefits arising from the promulgation of standards in general, however, Congress also identified specific areas in which particular standards would provide concrete advantages for government purchasing. One such standard was the "input/output channel level interface" standard (I/O standard). Input/output channels connect peripheral equipment such as display terminals, keyboards, and printers to the computer mainframe, which performs most of the computer's logical operations. The major computer manufacturers such as appellants and IBM offer their customers both mainframes and peripheral equipment, and it was from these "systems" manufacturers that federal agencies had usually purchased their ADP requirements. This practice, although more convenient for agency customers, was believed to be too expensive. Elmer Staats, Comptroller General, addressed this problem at hearings held by the Joint Economic Committee in 1970. At that time, he explained that the General Accounting Office (GAO) had determined in a recent study that more economical procurements could be made if some components were purchased from suppliers other than the mainframe supplier. According to the study, substantial savings could be achieved immediately through this procurement method because some of the components currently available were directly interchangeable, or "plug-to-plug compatible," with those of the major suppliers. Where the components were not plug-to-plug compatible, however, this method of procurement could be utilized only if adequate interfaces between the mainframe and the peripheral components were developed. *Economy in Government Property Management—Procurement of Data Processing Equipment: Hearing Before the Subcomm. on Economy in Government of the Joint Economic Comm.*, 91st Cong., 2d Sess. 4–5 (1970) (testimony of Elmer Staats). Such development would permit government

agencies to derive from this marketing strategy maximum benefits—competition among components manufacturers and "increased flexibility in the selection and use . . . of those components best suited to achieve the desired objectives." *Id.* at 12 (statement of Elmer Staats).

B. *Development of the Present I/O Standard*

Recognition of these benefits, however, did not induce, either easily or speedily, the creation of the desired standard. As early as 1967 the American National Standards Institute (ANSI) had established a joint industry-government committee intended, initially, to investigate the feasibility and practical impact of I/O interface standardization and, subsequently, to develop voluntary I/O standards for the industry. While the committee failed in its second objective, its failure did prompt congressional charges of purposeful industry delay and a call for mandatory standards promulgated by the government.[3]

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[3]The House Report following hearings conducted in 1976 on the implementation of the Brooks Act reflects congressional determination to obtain the I/O standards. In its discussion of the failure of NBS to develop these standards, the Report states:

> . . . NBS has not aggressively pursued the development of these standards because it apparently has been committed to the adoption of voluntary standards developed under American National Standards Institute (ANSI) procedures. This voluntary process under ANSI is generally sound so long as it does not unduly impede the development of worthwhile standards. When, however, as in the case of the Input/Output Interface standards, conflicting interests serve to preclude the timely adoption of a standard, NBS has the obligation to develop Federal Standards. . . .
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> It has been alleged that the development of ADP standards will preclude the Government from taking advantage of technological advances and perhaps even stifle the development of such advances. If, in

Responding to this concern, the Department of Commerce published, and subsequently promulgated,[4] the four interface standards at issue here. These standards "define the mechanical, electrical and functional interface specifications for connecting computer peripheral equipment, such as magnetic tape and disk devices, as a part of medium and large scale automatic data processing (ADP) systems."[5] Decision Memorandum (D.M.) Regarding Recommended Federal Information Processing Standards for I/O Channel Level Interface (Jan. 22, 1979) at 1, Joint Appendix (J.A.) at 89. Through the promulgation of these standards, the Department expected to increase competition among peripheral equipment suppliers—and thus enjoy lower purchasing costs—and to increase opportunities for exchange or transfer of equipment among agencies, thereby employing more efficiently the government's existing ADP inventory. D.M. Regarding Recommended Federal Information Processing Standard for Rotating Mass Storage Subsystems (Aug. 8, 1979), J.A. at 102.

Appellants, submitting comments on the proposed standards, raised two principal objections. First, they argued that because the standards embodied IBM specifications to which appellants did not presently conform, appellants would be required to expend great amounts of time

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fact, there is any validity to this allegation, the pitfalls suggested therein can be avoided by NBS maintaining constant vigilence (sic) to assure that standards are modified in accordance with advances in technology.

H.R. REP. No. 1746, 94th Cong., 2d Sess. 8 (1976).

[4]The President transferred his authority to approve standards to the Secretary of Commerce in Exec. Order No. 11717, Section 2, 38 Fed. Reg. 12,315 (May 11, 1973), *reprinted in* 31 U.S.C. § 16 (1976).

[5]Small scale systems with a purchase price of less than $400,000 were exempted by the Department of Commerce. 44 Fed. Reg. 16,466 (1979).

and money in order to compete for government ADP contracts. IBM would thus occupy a highly favored position vis-a-vis other ADP suppliers in the government market. Because appellants provide the only major alternatives to IBM, this disparity would hinder the operation of the desired competition. Appellants' second argument focused on the fact that the IBM specifications utilized by the Department were already fifteen years old. By mandating adherence to such standards, appellants contended, the Secretary was freezing a critical element of computer systems at an outdated level of technology, and effectively slowing the innovative process.

Contrary to these assertions, however, the Secretary found that the standards would not place any manufacturer at a competitive disadvantage. Indeed, according to the Secretary, over seventy manufacturers already made available to federal agencies equipment with interfaces of, or substantially similar to, the type established by the standards. In addition, the Secretary felt that delay of the effective date of the standards to three hundred days subsequent to promulgation provided noncomplying manufacturers with sufficient time to develop conforming interfaces. Finally, the Secretary found that the standards would not adversely affect technological innovation. In any event the standards would be evaluated within three years, at which time any adverse impact could be readily assessed. *See* Brief for Appellees at 15 n.7.

C. *The District Court Decision*

Finding no relief at the administrative level, plaintiffs brought suit in the district court. They requested a judgment declaring the I/O standards to be invalid and enjoining the Secretary from enforcing those standards. United States District Judge Penn concluded, however, that the ADP suppliers lacked standing to assert their claims and dismissed the case in accordance with defendants' motion. *Honeywell Information Systems, Inc. v. Hodges*, 85 F.R.D. 339 (D.D.C. 1980), J.A. at 156–64.

In reaching his decision Judge Penn held that plaintiff-suppliers must support their right to sue in two contexts—constitutional and prudential. The constitutional burden, imposed by the Article III "case or controversy" limitation, requires that plaintiffs successfully demonstrate a "personal stake in the outcome of the litigation." *Id.* at 342, J.A. at 160. Citing *Flast v. Cohen*, 392 U.S. 98, 101 (1968), Judge Penn found that plaintiffs satisfied this standard because, as major suppliers of government ADP equipment, they would arguably suffer substantial economic injury if the standards they challenged were implemented. In the prudential context, however, Judge Penn found plaintiffs unable to meet their burden. The prudential considerations, as articulated in the "zone of interests" test, require plaintiffs to demonstrate that the interest they seek to protect is arguably within the zone of interests protected by the relevant statute. After examining both the purpose and the legislative history of the Brooks Act, Judge Penn determined that the Act is "merely designed to establish a more economic and efficient system for procurement of ADP equipment by the federal government." *Id.* at 343, J.A. at 162. He found nothing which implied that the statute is "directly or indirectly designed to afford protection for these plaintiffs," and concluded that "while the plaintiffs may suffer an economic loss and may well be a logical party to challenge the Standards, the interests they assert do not fall within the requisite zone of interests protected by the Act." *Id.*, J.A. at 163.

Judge Penn also determined that these suppliers could not avoid their prudential burden by relying on *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970), and *Ballerina Pen Co. v. Kunzig*, 433 F.2d 1204 (D.C. Cir. 1970), *cert. dismissed*, 401 U.S. 950 (1971). He found plaintiffs' reliance misplaced as those cases were "readily distinguishable" from the case they presented. 85 F.R.D. at 343, J.A. at 163. In both *Scanwell* and *Ballerina Pen*, the plaintiffs were disappointed bidders for government contracts. Moreover, in *Ballerina Pen* the court had

actually applied the zone of interests test and found it satisfied, while in *Scanwell* the court "came close to articulating such a 'test'" and arrived at a decision "not inconsistent with later decisions applying the zone of interests test." *Id.* Having concluded, therefore, that plaintiffs could not satisfy in any manner the prudential aspects of the standing inquiry, Judge Penn granted defendants' motion to dismiss. Plaintiffs then filed a timely appeal.

II. Discussion

We begin our standing inquiry with a statement of the standard against which we must evaluate appellants' right to sue in the present instance. This standard establishes three requirements: 1) appellants must allege injury in fact;[6] 2) appellants must assert that arbitrary or capricious agency action injured an interest arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question; 3) there must be no "clear and convincing" indication of a legislative intent to withhold judicial review.[7] *Ballerina Pen Co. v. Kunzig*, 433 F.2d 1204, 1207 (D.C. Cir. 1970), *cert. dismissed*, 401 U.S. 950 (1971). The first requirement need not detain us

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[6] The Supreme Court has expounded upon the nature of this constitutional aspect of the standing inquiry since our decision in *Ballerina Pen*. In Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976), for example, the Court emphasized that a plaintiff must show "an injury to himself that is likely to be redressed by a favorable decision." *Id.* at 38. As the Court explained, this constitutional requirement mandates "that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Id.* at 41–42. As we point out, appellants here have alleged a specific economic injury caused by the Government. This constitutional requirement has therefore been met.

[7] In light of our disposition of this case, we find it unnecessary to reach this third criterion.

long. Appellants have alleged here that the implementation of the I/O standards will cause them substantial economic injury. They claim that if they choose to comply with the standards, they must expend considerable time and effort to ensure the equipment's conformance to the mandated specifications. If they choose not to comply, they will be effectively precluded from offering their products in the government ADP market. Such allegations sufficiently describe the specific injury appellants will sustain as a result of the Secretary's action. Like the district court, then, we believe that appellants have demonstrated the requisite "personal stake" in the litigation and meet, thereby, their constitutional burden.

Appellants' attempts to fulfill the prudential requirement, on the other hand, require extended consideration. Appellants make two arguments in support of their contention that they satisfy the zone of interests test.[8] First, they assert that their interest in continuing to compete for federal ADP contracts is arguably within the zone of interests protected by the Brooks Act and the Federal Property and Administrative Services Act—of which the former is a part. They argue that competition has been recognized as an effective avenue to the accomplishment of the professed goals of these statutes, and that by challenging standards which allegedly inhibit competition appellants promote the congressional interest in free and open competition. Second, appellants contend that, under the rationale of *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970) and its progeny, they may act as private attorneys general to vindicate the public interest in maintaining full competition for federal ADP contracts. The economic loss that they will sustain from the implementation of the

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[8] We find appellants' third argument that they have common-law standing to challenge the Secretary's action in wrongfully interfering with their business relationships to be wholly without merit.

challenged standards, appellants claim, makes them the logical party to assert the public interest in ensuring the Secretary's compliance with his congressional mandate.

Appellees, on the other hand, argue that the principles of *Scanwell* must be limited to the bidder context in which they were expressed, and that, in any event, *Scanwell* and its successors do not excuse appellants from satisfying the zone test. Appellees further assert that appellants cannot meet the zone standard, for the legislative history shows conclusively that the Brooks Act is merely a "housekeeping" statute, and that Congress undertook its quest for competition to improve the government's bargaining position vis-a-vis ADP suppliers, reducing thereby the government's ADP expenditures. Therefore appellants are not, in any sense, intended beneficiaries of the Brooks Act, and their economic interests must necessarily fall without the zone of interests protected by that statute.

A careful evaluation of the parties' contentions demands, in the first instance, a viable standard against which they can be measured. In this case the acknowledged standard is the zone of interests test. The test's amorphous nature, however, makes application difficult and careful evaluation impossible absent some refinement. To apply the zone of interests standard in a principled fashion, then, we must attempt to give it content and form, definition and scope. For this purpose we proceed to an examination of the origins of the test and of its present status.

The zone of interests test made its initial appearances in four cases decided by the Supreme Court in 1970 and 1971. In the first of these, *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), sellers of data processing services sought to challenge a ruling by the Comptroller of the Currency that national banks could make data processing services available to banks and their customers. These sellers had been denied standing on the ground that they had no cognizable "legal interest" in the allegedly unlawful competition approved by the Comp-

troller. The Court rejected this theory as a basis for the denial of standing, stating that while the legal interest criterion was pertinent to a determination of the merits, the relevant inquiry for standing purposes was "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153. Having thus identified the relevant test, the Court briefly concluded—without further explanation or articulation of the criteria governing its application of the test—that section 4 of the Bank Service Corporation Act[9] arguably brought a competitor within the zone of interests protected by it.

On the basis of this conclusion, the Court thereafter granted standing in two other cases challenging attempts by banks to extend the range of their proffered services. In *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970), travel agents sought, again under section 4, the right to contest the Comptroller's ruling that national banks could provide travel services for their customers. Remarking that nothing in *Data Processing* limited the protection provided by section 4 to competitors in the data processing field,[10] the Court upheld the right of these agents to sue, explaining

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[9]Section 4 provided that "[n]o bank service corporation may engage in any activity other than the performance of bank services for banks." 12 U.S.C. § 1864 (1976).

[10]The Court stated:

> The only legislative history of the Bank Service Corporation Act mentioned in the opinion was that § 4 was a "'response to the fears expressed by a few senators, that without such a prohibition, the bill would have enabled "banks to engage in a nonbanking activity," S. REP. No. 2105 [87th Cong., 2d Sess., 7–12] (Supplemental views of Senators Proxmire, Douglas, and Neuberger), and thus constitute "a serious exception to the accepted public policy which strictly limits banks to banking." (Supplemental

that "[w]hen national banks begin to provide travel services for their customers, they compete with travel agents no less than they compete with data processors when they provide data-processing services to their customers." *Id.* at 46 (footnote omitted). In *Investment Co. Institute v. Camp*, 401 U.S. 617 (1971), challenges were made to portions of a regulation issued by the Comptroller which purported to "authorize banks to establish and operate collective investment funds. . . ." *Id.* at 619. This time, however, petitioners invoked not the prohibitions of section 4 of the Bank Service Corporation Act, but the strictures of sections 16 and 21 of the Glass-Steagall Act of 1933. 12 U.S.C. §§ 24, 378 (a) (1976). This difference exerted no apparent influence on the Court's decision. Instead, framing the issue as whether national banks could legally compete with open-end investment companies or securities dealers, the Court found no distinction between the competition presently challenged under the Glass-Steagall Act and the competition it had found in *Data Processing* to be within the relevant zone of interests of the Bank Service Corporation Act. Accordingly, the Court concluded that opposition to petitioners' standing to sue was foreclosed by its decision in *Data Processing*.

The fourth case, unlike the others, did not involve a challenge to attempted expansion of national banking activities. Rather, in *Barlow v. Collins*, 397 U.S. 159 (1970), cash rent farmers protested a regulation promulgated by the Secretary of Agriculture which defined "making a crop" in a manner adverse to their interests. In its evaluation of petitioners' right to bring this action, the Court examined the Food and Agriculture Act of 1965 and its legislative history, as well as the legislative history of the "making a crop" provision. *Id.* at 164–65. Each of these sources, in the Court's opinion, indicated that Congress intended the inter-

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views of Senators Muskie and Clark).'" 397 U.S. at 155.

400 U.S. at 46 n.3.

ests of tenant farmers to be protected by the Secretary. The tenant farmers were therefore "clearly" within the zone of interests protected by the Act and entitled to maintain their challenge to the Secretary's regulation.

In these four cases the Supreme Court discarded the outdated legal interest criterion and interposed a new zone of interests test more compatible with the perceived trend toward the enlargement of the class of persons entitled to protest administrative action. *Data Processing*, 397 U.S. at 154. This new test was starkly stated, however, without accompanying expression of the methods to be utilized in its application. Moreover, the Court's own applications of the fledgling standard were generally conclusory in nature, and consequently failed to provide the desired clarification.

Despite the difficulties engendered by this lack of guidance, the Court has not attempted to develop, in the years since *Data Processing* and its immediate progeny, a more mature zone of interests standard. In that time the Court has specified no guidelines for the test's application nor has it even undertaken to apply the zone test in a standing inquiry. At least one commentator has suggested that this neglect indicates the Court's implicit abandonment of the zone standard.[11] The Court's express reaffirmation of the test's existence, albeit in summary fashion,[12] requires us to

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[11] K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.02–11, at 509 (Supp. 1976) ("a second reason for doubting that the 'zone' test is the law is that the Supreme Court itself has not followed it.").

[12] *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727, 733 & n.5 (1972); United States v. SCRAP, 412 U.S. 669, 686 & n.13 (1973); Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 39 n.19 (1976); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 n.6 (1979).

In *Gladstone*, for example, the Court addressed the zone standard in this manner:

> There are other nonconstitutional limitations on standing to be applied in appropriate circumstances.

assume, however, the test's continued role as a prudential limitation.[13] We must, therefore, apply the test despite the Court's failure to provide more specific guidance.

In light of this conclusion we pause to address appellants' contention that they possess standing on the basis of the rationale articulated in *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970). In *Scanwell*, a pre-*Data Processing* case, this court held that a disappointed bidder had standing to challenge a contract award by the Federal Aviation Administration. The court based its conclusion on the premise that Congress could, subject to constitutional restraints, empower any person to bring suit in

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See, *e.g.*, *Simon v. Eastern Kentucky Welfare Rights Org.* . . . ("the interest of the plaintiff, regardless of its nature in the absolute, [must] at least be 'arguably within the zone of interests to be protected or regulated' by the statutory framework within which his claim arises," quoting *Data Processing Serv. v. Camp* . . . .").

Id.

[13] Congress has the power to eliminate this prudential limitation, and apparently attempted to do so in 1976. At that time the subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee examined several bills "to expand and improve the Administrative Procedure Act." Included among the proposed "Administrative Procedure Act Amendments of 1976" was S. 3296. Under this provision standing was to be granted to any person who had participated in an agency proceeding giving rise to the agency action of which review was sought, or to any interested person who satisfied certain procedural requirements. The explicit intent of the provision was "to establish clear standards by which courts and litigants alike can readily determine whether a given plaintiff has standing" and to "eliminate nonessential, 'prudential limitations' on standing. . . ." Administrative Procedure Act Amendments of 1976: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess. 40 (1976).

the public interest—even where that person was unable to demonstrate injury to a legally protected right. In the Administrative Procedure Act (APA), Congress had conferred the right of judicial review upon any person "adversely affected or aggrieved by agency action." 5 U.S.C. § 702 (1976). The court concluded that disappointed bidders were persons aggrieved by the loss of a contract award causing them cognizable economic injury. This injury, the court believed, would provide such bidders with adequate incentive to challenge the allegedly illegal action and ensure as well the genuine adversariness required by the case or controversy limitation of Article III. Thus, the court determined, allowing disappointed bidders to bring suit would permit them to "vindicate their very real interests" and further as well "the public interest in having agencies follow the regulations which control government contracting." *Id.* at 864.

Appellants suggest that they may similarly vindicate the public interest in the Secretary's fulfillment of his congressional mandate to maintain a competitive procurement process. We recognize that, like the disappointed bidder in *Scanwell*, appellants here allege a substantial economic loss from the challenged agency action. We acknowledge as well the undoubted public interest in having the Secretary give appropriate attention to the importance of competition in his formulation of I/O interface standards. Because we have determined that the zone standard must be applied where appropriate, however, we cannot sustain appellants' standing solely on this basis unless we find that the standard is inapplicable to the bidder situation and that the *Scanwell* rationale should be extended beyond its "disappointed bidder" context. We can indulge appellants on neither point.

Appellants argue that *Merriam v. Kunzig*, 476 F.2d 1233 (3d Cir.), *cert. denied*, 414 U.S. 911 (1973),[14] *Constructores*

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[14] In *Merriam* the court allowed a disappointed bidder to challenge a contract for leasehold space awarded by the General

Civiles de Centroamerica, S.A. v. Hannah, 459 F.2d 1183 (D.C. Cir. 1972), *see* note 22 *infra*, and *Ballerina Pen Co. v. Kunzig*, 433 F.2d 1204 (D.C. Cir. 1970), *cert. dismissed*, 401 U.S. 950 (1971),[15] support their contention that a government contractor who has suffered economic injury as a result of illegal agency action may, even after *Data Processing*, vindicate the public interest by bringing suit against the errant agency. In making this assertion they note the lack of an explicit zone analysis in *Ballerina Pen*, the observation in *Constructores* that "some of our decisions indicate that injury in fact alone may suffice to establish standing," 459 F.2d at 1188, and the expressed willingness in *Merriam* to recognize appellant's standing even on the assumption that he did not fall within the zone of interests protected by the relevant statute. 476 F.2d at 1242 n.7.

A closer look at these cases, however, reveals the fragility of the foundation upon which appellants would have us

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Services Administration pursuant to the Federal Property and Administrative Services Act. Remarking that procurement procedures established by that Act forbade the acceptance of a nonconforming bid, the court concluded that "the statute protects not only the Government's interest in securing advantageous contracts, but also the interest of those responding to the Government's invitation to do business with it." 476 F.2d at 1242 (footnote omitted).

[15] In *Ballerina Pen* this court granted standing to ball point pen suppliers seeking to challenge the inclusion of ball point pens on the Schedule of Blind-Made Products. Under the Wagner-O'Day Act, 41 U.S.C. §§ 46–48 (1976), products on this schedule would be provided to the government by non-profit agencies for the blind, rather than by a contractor selected through the usual competitive bid system. The court allowed the suppliers to challenge their exclusion from the government market after determining that Congress had expressed some concern for private industries which might be disadvantaged by the inclusion of certain products on the schedule. 433 F.2d at 1213.

premise their standing. In each of these cases the zone test was explicitly recognized as a relevant part of the standing inquiry. In both *Constructores* and *Merriam*, moreover, the courts expressly determined the appellants to be within the relevant zone of interests, while in *Ballerina Pen* the court discerned from the legislative history a congressional intent to protect the appellants from the type of action challenged. In none of these post-*Data Processing* cases did the court actually base its grant of standing solely upon an asserted economic injury. We cannot, therefore, purport to do so on the authority of their holdings. *See Kinnett Dairies, Inc. v. Farrow*, 580 F.2d 1260, 1265 (5th Cir. 1978).

Even were we to read those cases as broadly as appellants request, however, we would be unable to justify the extension of the *Scanwell* rationale to these circumstances. Appellants here cannot claim the special relationship found by the *Merriam* court to exist between a bidder and the government; unlike the bidder in the context of a solicitation, they have not "placed in the hands of the representatives of the Government the power to bind [them] to a contract." 476 F.2d at 1242 n.7. Appellants cannot, moreover, claim the special injury discerned in *Ballerina Pen*—absolute preclusion from the government market. They are instead free to decide whether to conform to the proposed specifications or to withdraw from the government market. We find in this case, then, none of the special factors present in the bidder cases which made a grant of standing particularly appropriate.

We find, in addition, a more important distinction between this case and those in the bidder area: these circumstances offer the potential for impermissible intrusion upon the government's prerogative to dictate the specifications for the products it wishes to purchase. Characterized by the Supreme Court in *Reeves, Inc. v. Stake*, 100 S.Ct. 2271, 2278 n.12 (1980) as the "'unrestricted power . . . to fix the terms and conditions upon which it [the Government] will make needed purchases,'" quoting *Perkins v.*

Lukens Steel Co., 310 U.S. 113, 127 (1940), this prerogative is one traditionally exercised by the legislative and executive branches rather than the judiciary. As this court recently noted in *American Federation of Labor v. Kahn*, 618 F.2d 784, 794 n.55 (D.C. Cir.) (en banc), *cert. denied*, 443 U.S. 913 (1970), "nothing has undercut [this] view of the Government's contracting power." Accordingly, we cannot allow appellants to challenge, on the basis of the *Scanwell* rationale, the government specifications embodied in the I/O interface standards absent some demonstration by appellants that they meet the zone standard. We turn, therefore, to the case law of the federal courts for help in making a principled application of that standard.

A survey of this law reveals, however, more variety than uniformity among the approaches to the zone test. Some courts, reacting strongly to the Supreme Court's vague formulation of the test, have expressed disagreement with the standard,[16] clearly misapplied it,[17] or virtually ignored it.[18]

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[16] *See, e.g.*, Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208 (8th Cir. 1972). In this case the court recorded its "preference for simplifying the 'law on standing.' We think that all that is required for a plaintiff to have standing to sue for a constitutional or statutory violation is a showing of 'injury in fact.'" *Id.* at 1212 n.4.

[17] *See* Upper Pecos Ass'n v. Stans, 452 F.2d 1233, 1235 (10th Cir. 1971), *vacated on other grounds*, 409 U.S. 1021 (1972), *and* Izaak Walton League of America v. St. Clair, 313 F. Supp. 1312, 1316–17 (D. Minn. 1970). *See also* Gibson & Perin Co. v. City of Cincinnati, 480 F.2d 936 (6th Cir.), *cert. denied*, 414 U.S. 1068 (1973).

[18] *See, e.g.*, Florida v. Weinberger, 492 F.2d 488, 494 (5th Cir. 1974) (grant of standing to the state plaintiff solely on the basis of its "clear interest . . . in the manner in which the Medicaid program is administered vis-a-vis its citizens and in being spared the reconstitution of its statutory program. . . ."); William F. Wilke, Inc. v. Department of Army of United States, 485 F.2d 180 (4th Cir. 1973) (grant of standing to a dis-

Other courts, taking a more active approach, have attempted to refine the test into a workable standard. As a result of these efforts, it is generally recognized that in applying the zone test a court must discern whether the interest asserted by a party in the particular instance[19] is one intended by Congress to be protected or regulated by the statute under which suit is brought. *Constructores Civiles de Centroamerica, S.A. v. Hannah*, 459 F.2d 1183, 1188 (D.C. Cir. 1972). Most courts also acknowledge that the sources pertinent to this examination are the language of the relevant statutory provisions[20] and their legislative history.[21] *See, e.g., American Federation of Government Em-*

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appointed bidder for a government contract without mentioning the zone standard).

[19] As this court explained in Tax Analysts & Advocates v. Blumenthal, 566 F.2d 130, 142 n.76 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978):

> We are aware of the confusion surrounding the meaning of which interests are relevant to the zone test . . . . Essentially, the confusion surrounds what exactly has to fall within the relevant zone: 1) the parties themselves; 2) the interests of the parties in general; or 3) the particular interest the parties are asserting in the litigation. It seems clear to us that the particular interests are the relevant interests in the context of an application of the zone standard . . . .

[20] In determining which provisions are relevant to this examination, this court has stated that it will look to the particular statutory provision at issue in a case, rather than the entire statutory framework. It has acknowledged, however, that both the particular and general may be relevant sources where they share an identity of purpose. *See* Tax Analysts & Advocates v. Blumenthal, 566 F.2d 130, 140–41 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978).

[21] We do not believe that our examination of the legislative history and subsequent congressional commentary here conflicts with this court's discussion in *Tax Analysts*, 566 F.2d at

ployees v. Dunn, 561 F.2d 1310, 1312–13 (9th Cir. 1977); *Rodeway Inns of America, Inc. v. Frank*, 541 F.2d 759 (8th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977); *Window Systems, Inc. v. Manchester Memorial Hospital*, 424 F.Supp. 331, 336 (D.Conn. 1976). An application of the test under even this approach, however, still affords a court great latitude in defining the scope of the relevant zone; the conclusions it derives from these legislative sources will vary according to the nature and quantity of the "beneficial indicia" it requires.[22]

140–43. Congressional intent regarding ADP suppliers is clearly reflected in the legislative history and confirmed by the long-standing oversight of the Act's implementation by its sponsor and other members of Congress.

[22] *Compare, e.g.*, Constructores Civiles de Centroamerica, S.A. v. Hannah, 459 F.2d 1183 (D.C. Cir. 1972), and Diggs v. Shultz, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973), *with* Rodeway Inns of America, Inc. v. Frank, 541 F.2d 759 (8th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977). In *Constructores*, the court held that a Honduran corporation had standing to challenge its disqualification as a bidder on a contract awarded under a loan agreement negotiated between the Agency for International Aid and the Central American Bank for Economic Integration and authorized by the Foreign Assistance Act of 1961, 22 U.S.C. § 2151 *et seq.* (1970). Noting that this zone of interests test could be satisfied by "slight beneficiary indicia," 459 F.2d at 1189, the court found such indicia upon examination of relevant statutory provisions and the policy statement of the Foreign Assistance Act. The court explained:

> These broadly stroked provisions obviously do not specify particular individuals or groups to be served by the loan assistance program. The statute speaks to socio-economic interests of the peoples of Latin America. However, the requirement for standing is only that the asserted interest be arguably within the zone of interests sought to be protected. Certainly the economy of a country is dependent upon the stability of local business enterprises such as CONCICA. Suffice it to say that the challenging party need only

This court has stated that "slight" beneficial indicia will be sufficient to sustain a party's assertion of standing. *Constructores Civiles de Centroamerica, S.A. v. Hannah*, 459 F.2d 1183, 1189 (D.C. Cir. 1972). Although this standard would seem to invite a liberal interpretation of congressional intent, our review of the relevant statutory provisions and legislative history reveals *no* evidence of an intent to protect or benefit these appellants. As discussed in Part I.A of this opinion, the Brooks Act was passed as an amendment to the Federal Property and Administrative Services Act of 1949. Both statutes express congressional interest in economic and efficient procurement of property, 40 U.S.C. § 759(a) (1976) and 40 U.S.C. § 471 (1976); in both Congress recognized the maximization of competition

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show that it is an intended beneficiary of the statute not necessarily the primary one.

Id.

The court defined a similarly broad zone in *Diggs* when it permitted persons denied entry and emigres denied re-entry into Rhodesia to challenge the congressional decision to permit importation of materials from that country in alleged violation of the United States commitment to a United Nations embargo on trade with Rhodesia. In defining the scope of the protected zone, the court stated that "United Nations Security Council Resolution 232 was—and is—an attempt by means of concerted international pressure to turn the Rhodesian Government away from the course of action which has resulted in the adverse circumstances experienced by appellants. They are unquestionably within the reach of its purpose and among its intended beneficiaries." 470 F.2d at 464.

Rodeway, on the other hand, arguably represents a more restrictive application of the test. In that case the court held that hotel owners would not be heard to challenge a decision by the Department of Housing and Urban Development to convert an apartment building into a hotel. The court denied standing in light of the purposes of the National Housing Act, 12 U.S.C. § 1701 *et seq.* (1976), even though two sections of the Act did provide protection to competition. 541 F.2d at 765–66.

as an important means to its objective. 41 U.S.C. § 253(a) (1976) and H.R. REP. No. 802, 89th Cong., 1st Sess. 25 (1965). This interest in competition is not, however, congruent with that interest in competition asserted by appellants. Appellants, as major suppliers, wish to challenge the I/O standards promulgated by the Secretary of Commerce because these standards will require appellants to make considerable expenditures of time and money to produce equipment suitable for the government ADP market. Appellants believe that these resulting costs will destroy not only their individual competitive positions but also their collective position as the sole realistic alternative to IBM. Thus appellants' interest in competition is rooted in economic self-preservation.

The congressional interest in competition, when viewed in its proper context, is grounded upon a quite different premise. The Brooks Act resulted from a growing perception that certain trends in ADP acquisition and use were leading to "costly inefficiencies." H.R. REP. No. 802, 89th Cong., 1st Sess. 18 (1965). To avoid these inefficiencies, Congress established in the Act a coordinated management program directed particularly toward the economic acquisition of ADP equipment. Such acquisition, in turn, depended upon the successful implementation of several proposals, including the improvement of the government's bargaining position vis-a-vis ADP suppliers through volume acquisition,[23] *id.* at 27-29; the selection of equipment offering the

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[23] As the Comptroller General explained in his testimony on H.R. 4845:

> The system of procurement must be altered so that the Government's bargaining position is improved in a substantive sense by centralized procurement to obtain discounts for quantity purchases.
>
> Strengthening of the Government's bargaining position will, in turn, lead to better contract provisions.

Automatic Data Processing Equipment: Hearings on H.R. 4845 Before the Subcomm. on Government Activities of the House

largest purchase advantage on a government-wide basis, *id.* at 32–34; the creation of adequate standards, *id.* at 22, and the increase of competition among suppliers, *id.* at 25, 28–29. Despite this variety of approaches, however, only one end was sought—lower government ADP costs. *See, e.g., id.* at 20, 36. Competition was not, therefore, valued for itself, but for the benefits it could bring the government. *See, e.g., id.* at 25.

Since the passage of the Brooks Act, Congress has maintained its interest in competition.[24] The standards challenged here were intended to foster competition among systems manufacturers and between such manufacturers and peripheral suppliers. Consistent with the indications of congressional intent just discussed, however, this increased competition was expected to inure to the benefit of the government, rather than ADP suppliers. We note, moreover, that to enjoy these advantages Congress was determined to

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Comm. on Government Operations, 89th Cong., 1st Sess. 20 (1965) (statement of Joseph Campbell).

[24] *See, e.g.*, H.R. REP. No. 96–694, 96th Cong., 1st Sess. 62 (1979):

> The Brooks Act is grounded upon two basic objectives: (1) ADP resources should be procured as economically and efficiently as possible; and (2) only those resources should be procured which are needed and which can assist (rather than retard) the management of Government programs.
>
> To accomplish the first objective, *it is essential that Federal agencies be required to procure their ADP requirements on a fully competitive basis unless exceptional circumstances intervene.*

(Emphasis added).

We realize, of course, that post-enactment congressional discussion of legislation is to be given limited weight in statutory construction. We include such discussion here, however, for its value as a persuasive manifestation of the consistent congressional approach to the Brooks Act.

obtain an effective I/O interface standard, despite its recognition of the possible adverse effects on ADP suppliers such as appellants.[25] In light of these consistent congressional indicators, therefore, we cannot find that appellants' interest lies within that zone of interests intended to be protected by the Brooks Act.[26]

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[25] In hearings conducted by the Joint Economic Committee in 1970, Chairman Proxmire expressed his concern that the slow progress was attributable to industry "foot-dragging":

> Chairman PROXMIRE. You see what I am getting at is the role of the industry, the role of the private parties here. . . . Do, for instance, the private parties through organizations such as ASI, or [ANSI] have a practical or effective veto over what the Department of Commerce has? [sic]
>
> * * *
>
> Mr. INK. The problem here, Mr. Chairman, is getting standards which are workable and realistic. . . . We can come up with standards, in effect, by edict insofar as Government procurement is concerned, but we don't want to come up with standards for the sake of standards. We want to come up with standards that are workable. . . .
>
> Chairman PROXMIRE. But that determination ought to be made by you. You see what concerns me there is . . . a vested interest by the big, very powerful and influential firms in the field to prevent this cost-reducing competition. They are doing mighty well under present circumstances, and if competition gets tough and drives down the cost to the Government their profits are going to diminish.
>
> So they have a real vested interest in exercising their position to drag their feet as long as they can.

Economy in Government Property Management—Procurement of Data Processing Equipment: Hearing Before the Subcomm. on Economy in Government of the Joint Economic Comm., 91st Cong., 2d Sess. 52–53 (1970) (exchange between Sen. Proxmire and Mr. Dwight Ink).

[26] Appellants also argue that their interest lies within that zone protected by the Federal Property and Administrative

III. CONCLUSION

In sustaining the district court's denial of standing, we do not feel that we have insulated the Secretary's action from critical review. The Secretary has stated that the standards will be reviewed within three years of their effective date and are subject at that time to revision or withdrawal if technological trends or other factors so require. 44 Fed. Reg. 10,100 (1979). More importantly, however, if these standards do seriously discourage the competition they were intended to promote, it is very likely that Congress will interject itself into the process and insist upon the necessary corrective measures. Certainly, Congress has been quite zealous in its previous oversight of the Brooks Act. It has held numerous hearings and made voluminous criticisms of the agencies' implementations of the Act's provisions and policies in the years since that Act's passage.[27]

Services Act of 1949 (FPASA). Ch. 288, 63 Stat. 377 (codified in scattered sections of 40 & 41 U.S.C.). The Brooks Act and the FPASA share the purpose of economical and efficient procurement and an interest in maximizing competition. As with the Brooks Act, however, there is no indication that the competition sought by Congress was intended to inure to the benefit of those in appellants' position. *Cf.* Public Citizen v. Lockheed Aircraft Corp., No. 74-535 (D.D.C. Jan. 8, 1975) (denial of competitor standing under the FPASA), *aff'd*, 565 F.2d 708 (D.C. Cir. 1977).

[27] *See, e.g.*, Economy in Government Property Management—Procurement of Data Processing Equipment: Hearing Before the Subcomm. on Economy in Government of the Joint Economic Comm., 91st Cong., 2d Sess. (1970); Army Procurement of Computer Systems: Hearing Before the Subcomm. on Legislation and National Security of the Comm. on Government Operations, 94th Cong., 1st Sess. (1975); Review of Administration of Public Law 89-306, Procurement of ADP Resources by the Federal Government: Hearings Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations, 94th Cong., 2d Sess. (1976); H.R. REP. No. 1746, 94th Cong., 2d Sess. (1976); H.R. REP. No. 694, 96th Cong., 1st Sess. (1979).

We find no reason to assume that these congressional efforts will decrease either in vigor or number.

While we realize that these observations offer small comfort in the face of the economic injury appellants may suffer, we feel our decision is compelled by the present law of standing. Although confusing and perhaps inconsistent,[28] that law dictates the continued role of the zone of interests tests as a prudential limitation. We must therefore apply the test in appropriate circumstances and in a manner calculated to serve its intended purpose of

> allowing courts to define those instances when it believes the exercise of its power at the instigation of a particular party is not congruent with the mandate of the legislative branch in a particular subject area.

Tax Analysts, 566 F.2d at 140.

We have found no justification for avoiding the application of the zone test to the present circumstances. We believe, moreover, that because these circumstances involve the government's prerogative to dictate the specifications of those products it will purchase, our application must fully reflect our awareness of the test's importance as a limitation on the role of the courts in resolving public disputes. In light of this obligation we have scrutinized carefully the legislative history and defined accordingly the scope of the zone of interests protected by the Brooks Act. As drawn,

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[28] We are not unmindful of the quality of fantasy or play in the search for beneficiaries. "Litigants search for a personality that will fit the demands of the court, tailor their attributes, paint their faces, manipulate their identities, and attend a masked ball where they hope to receive a prize for the imagination and ingenuity they display." J. VINING, LEGAL IDENTITY 123 (1978). We do not believe that it is our place, however, to call a halt to this "masked ball."

this zone of interests must exclude appellants. Accordingly, the decision of the district court is

Affirmed.

APPENDIX B

JUDGMENT OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

No. 80-1143

Civil Action No. 79-2716

CONTROL DATA CORPORATION, *Appellant*

v.

MALCOLM BALDRIDGE, *Secretary of Commerce, et al.*

No. 80-1152

Civil Action No. 79-2790

SPERRY CORPORATION, *Appellant*

v.

MALCOLM BALDRIDGE, *Secretary of Commerce*

No. 80-1165

Civil Action No. 79-2715

HONEYWELL INFORMATION SYSTEMS INC., *Appellant*

v.

MALCOLM BALDRIDGE, *Secretary of Commerce*

No. 80-1176

Civil Action No. 79-2717

BURROUGHS CORPORATION, *Appellant*

v.

MALCOLM BALDRIDGE, *Secretary of Commerce, et al.*

Appeals From The United States District Court For The District Of Columbia

Before: TAMM and EDWARDS, Circuit Judges, and LLOYD F. MACMAHON*, United States District Judge for the Southern District of New York

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court, that the judgment of the District Court on appeal herein is hereby affirmed for the reasons set forth in the Opinion for the Court filed herein this date.

Per Curiam
For the Court
/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Date: March 25, 1981
Opinion for the Court filed by Circuit Judge Tamm
*Sitting by designation pursuant to 28 U.S.C. §292(a).

APPENDIX C

OPINION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT,
DISTRICT OF COLUMBIA

Nos. CA 79-2715 to 79-2717 and
CA 79-2790.

HONEYWELL INFORMATION SYSTEMS INC., *Plaintiff,*

v.

LUTHER H. HODGES, JR., Acting Secretary of Commerce, *et al., Defendants.*

CONTROL DATA CORPORATION, *Plaintiff,*

v.

LUTHER H. HODGES, JR., Acting Secretary of Commerce, *et al., Defendants.*

BURROUGHS CORPORATION, *Plaintiff,*

v.

LUTHER H. HODGES, JR., Acting Secretary of Commerce, *et al., Defendants.*

SPERRY CORPORATION, *Plaintiff,*

v.

LUTHER H. HODGES, JR., Acting Secretary of Commerce, *Defendant.*

Jan. 30, 1980.

Corporations involved in design and manufacture of automatic data processing systems brought action seeking declaratory judgment and injunctive relief with respect to four standards, relating to such equipment, promulgated by Secretary of Commerce. The District Court, John Garrett Penn, J., held that the Brooks Act, which is an amendment to the Federal Property and Administrative Services Act, was designed to establish a more economic and efficient system for procurement of automatic data processing equipment by the federal government and was not intended to protect interests of companies such as plaintiffs; thus plaintiffs lacked standing to bring their action.

Order accordingly.

Milton Eisenberg, Washington, D.C., for Honeywell Information Systems, Inc.

Eldon H. Crowell, W. Stanfield Johnson, George D. Ruttinger, Washington, D.C., for Control Data Corp.

George L. Christopher, Washington, D.C., for Burroughs Corp.

Hadrian R. Katz, Washington, D.C., for Sperry Corp.

Scott T. Kragie, Asst. U.S. Atty., Washington, D.C., for all defendants.

MEMORANDUM OPINION

JOHN GARRETT PENN, *District Judge.*

The plaintiffs in these four cases bring these actions seeking declaratory judgments and injunctive relief with respect to four Standards, relating to automatic data processing (ADP) equipment, which were promulgated by the Secretary of Commerce. The Standards established mandatory specifications applicable to federal procurement of ADP equipment, for the interface between central processing units (computer mainframes) and magnetic tape and disc storage facilities (peripheral subsystems). The Standards are substantially identical to specifications developed more than fifteen years ago

and currently utilized by the International Business Machine Corporation (IBM). The plaintiffs seek a declaratory judgment that the Standards are invalid, and an injunction against their enforcement on the grounds that the Standards (a) are arbitrary, capricious, an abuse of discretion and not otherwise in accordance with law, (b) are in excess of the defendant's statutory jurisdiction, authority and limitations; and (c) were promulgated without observance of procedures required by law.

I

The plaintiffs, Honeywell Information Systems, Inc., Control Data Corporation, Burroughs Corporation and Sperry Corporation are all involved in the design and manufacture of ADP systems and each has substantial contracts with the federal government. The defendants named in these actions are the Secretary of Commerce, who promulgated the Standards, the Administrator of the General Services Administration, who is charged with implementing the Standards by including them in the Federal Property Management Regulations, and the Director of the Office of Management and Budget, who had responsibility for exercising fiscal and policy control over the development of the Standards.[1]

In promulgating the Standards, the Secretary purported to rely upon the authority of the Brooks Act (Act), 40 U.S.C. § 759. The Act is an amendment to the Federal Property and Administrative Services Act of 1949, 40 U.S.C. §§ 471 *et seq.*

The plaintiffs contend that the Standards are discriminatory in that they discriminate against systems manufacturers like plaintiffs whose equipment does not conform to the IBM based specifications, and favor in addition thereto, Japanese manufacturers; that the Standards are anticompetitive in that all systems manufacturers, except IBM, would be required to undertake costly modifications of their systems architecture

[1] Not all defendants were named in each case.

and softwear in an effort to make their mainframe and peripheral systems conform to the Standards at great expense in time and costs; that the Standards are technologically obsolete, having been developed more than fifteen years ago; and that they will deprive the federal government of the "significant cost/performance advantages that technological innovations in computer circuitry offers."

The injury to plaintiffs allegedly results from the fact that each would be required to expend considerable time and money to conform with the Standards, or in lieu thereof, would suffer the loss of federal government contracts which constitute a substantial portion of their business.

II

The plaintiffs filed these cases in October 1979. Shortly thereafter, they filed motions for summary judgment pursuant to Fed.R.Civ.P. 56. They requested an expedited hearing on their motions since at that time they believed the Standards were to go into effect on December 13, 1979, but did not pursue that request when the effective date of the Standards was extended to June 23, 1980. The defendants filed motions to dismiss and shortly thereafter, responded to the pending motions for summary judgment, by filing motions to continue any hearing on the motions for summary judgment in order to allow them to undertake discovery. *See* Fed.R.Civ.P. 56(f). The plaintiffs filed oppositions to the Rule 56(f) motions and requested that the Court require defendants to file their responses to the motions for summary judgment and to rule on the merits.

This Court reviewed the defendants' motions to dismiss and concluded that they raised a substantial issue of standing. Those motions, if decided adverse to the plaintiffs, would be dispositive of these cases. Plaintiffs were directed to file their oppositions to the motions to dismiss, which they did within the time set by the Court, and the Court heard oral arguments on those motions on January 4, 1980. The Court has withheld action on both the plaintiffs' motions for summary judgment

and the defendant's motions for a continuance and discovery under Rule 56(f) pending its ruling on the defendants' motions to dismiss.

The defendants move to dismiss on several grounds, namely, that the plaintiffs lack standing to challenge the Standards issued under the Brooks Act, that the Court lacks jurisdiction over the subject matter of these actions, and that the complaint fails to state a claim upon which relief can be granted. This Court's review of the applicable law leads it to conclude that the plaintiffs lack standing to pursue their challenge to the Standards and that accordingly, these actions should be dismissed on that ground.

III

In order to maintain these actions, the plaintiffs must demonstrate that they have standing to sue. That doctrine has two sources, first is the case or controversy requirement of Article III of the Constitution, and second the "judicially imposed rules of self restraint" or "prudential limitations" imposed by the courts. *Tax Analysts & Advocates* v. *Blumenthal,* 184 U.S. App.D.C. 238, 245, 566 F.2d 130, 137, *cert. den.* 434 U.S. 1086, 98 S.Ct. 1280, 55 L.Ed.2d 791 (1977). With respect to the standing limitation under Article III it relates to whether the dispute is presented in an adversary context in the sense that the plaintiff has a personal stake in the outcome of the litigation. *Flast* v. *Cohen,* 392 U.S. 83, 98, 101, 88 S.Ct. 1942, 1951, 1953, 20 L.Ed.2d 947 (1968). Here, the plaintiffs meet that test since they allege that as major suppliers to the federal government, they stand to lose time and money and possibly their government contracts constituting a substantial portion of their business, in the event the challenged Standards become effective.

The second half of the standing doctrine however, is another matter. That doctrine incorporates what has come to be known as the "zone of interests test". *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970); *Barlow* v. *Collins,*

397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970); *Tax Analysts & Advocates* v. *Blumenthal, supra,* 184 U.S. App. at 247, 566 F.2d at 139. This test has been described as posing the question "whether the interest sought to be protected by the complainant is *arguably* within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question". (Emphasis this Court's.) 397 U.S. at 153, 90 S.Ct. at 830.

In considering this sometimes elusive doctrine, courts have viewed the subject statute, and often, its legislative history, to determine whether the interest the complainant seeks to protect is arguably within the zone of interests protected by the statute. In one case it was held that petitioners who sold data processing services had standing to challenge a ruling by the Comptroller of the Currency which purported to allow national banks to provide data processing services to its customers and other banks in competition with petitioners. Standing was based on the fact that the statute, 12 U.S.C. § 1864,[2] restricted banks to services normally performed by banks. When the Comptroller permitted the banks to engage in services outside of those proscribed by the statute in competition with the petitioners, the petitioners had standing to sue, the court concluding that the interest asserted by the petitioners was arguably within the zone of interests to be protected or regulated by the statute in question. *Association of Data Processing Service Organizations, Inc.* v. *Camp, supra.* The court's ruling, although not always correctly interpreted, *see, e.g., Arnold Tours, Inc.* v. *Camp,* 428 F.2d 359 (1st Cir.) *reversed and remanded,* 400 U.S. 45, 91 S.Ct. 158, 27 L.Ed.2d 179 (1970), was grounded on the fact that the statute restricting the activities of banks indirectly protected potential competitors and placed them, at least arguably, within the zone of interests. In *Arnold Tours, Inc.,* cited above, the

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[2] 12 U.S.C. § 1864 provides that "[n]o bank service corporation may engage in any activity other than the performance of bank services for banks.

Supreme Court held that travel agents had standing to challenge a ruling by the Comptroller of the Currency pursuant to the interest protected under the same statute as above, 12 U.S.C. § 1864, after the Comptroller permitted banks to provide travel services for their customers. In *Investment Company Institute* v. *Camp,* 401 U.S. 617, 91 S.Ct. 1091, 28 L.Ed.2d 367 (1971), the court held that petitioners, which operated mutual investment funds, had standing to challenge the Comptroller's approval of a bank's application to establish and operate a competing fund. An even clearer case is found in *Barlow* v. *Collins, supra,* where the court concluded that the statute and its legislative history demonstrated an intent by Congress to protect the interest of petitioners who were tenant farmers. Thus, petitioners in that case had standing to challenge amendments to regulations issued by the Secretary of Agriculture which the tenant farmers contended were adverse to their interests.

While the statutes involved in the above cases *arguably* protected, either directly or indirectly, some interest of the complainants who sought to challenge actions purportedly undertaken contrary to the statutes, the same is not true of the Brooks Act or for that matter, the Federal Property and Administrative Services Act. This Court finds nothing in the Act which implies that it was directly or indirectly designed to afford protection for these plaintiffs. Indeed, while the statutes in the above cited cases were regulatory, the statute involved here is not. The Brooks Act is merely designed to establish a more economic and efficient system for procurement of ADP equipment by the federal government. Likewise, a perusal of its legislative history reveals nothing which would suggest an intent by Congress to protect the interests of these plaintiffs. *See, e.g.,* S.Rep.No.938, 89th Cong., 1st Sess., *reprinted in* [1965] U.S.Code Cong. & Admin.News 1965, p. 3859. Thus, while the plaintiffs may suffer an economic loss and may well be a logical party to challenge the Standards, the interests they assert do not fall within the requisite zone of interest protected by the Act.

Plaintiffs attempt to bring themselves within the holding of *Scanwell Laboratories, Inc.* v. *Shaffer,* 137 U.S.App.D.C. 371, 424 F.2d 859 (1970), and *Ballerina Pen Co.* v. *Kunzig,* 140 U.S.App.D.C. 98, 433 F.2d 1204 (1970), but those cases are readily distinguishable. Both involved disappointed bidders for government contracts who were held to have standing. In *Scanwell* the plaintiff was invited to bid on a contract and when unsuccessful, challenged the award made to the lowest bidder on the grounds that that bid did not comply with the terms of the invitation to bid. Although the court in *Scanwell* did not discuss the zone of interests test, that test having been formulated thereafter in *Association of Data Processing Service Organizations, Inc.* v. *Camp, supra,* it appears to this Court that the *Scanwell* court came close to articulating such "a test" and that the decision in that case is not inconsistent with later decisions applying the zone of interests test. In *Ballerina Pen,* the plaintiff challenged the actions of the General Services Administration which added ball point pens and refills to the schedule of Blind-Made Products to be purchased by the government and issued a letter of commitment to National Industries for the Blind (NIB) which guaranteed purchases from it of 70% estimated annual requirements for all ball point pens and refills. The Court found standing applying the zone of interest test noting that the legislative history of the statute reflected an intention by Congress that the NIB not go into competition with private industry. 140 U.S.App.D.C. at 106-7, 433 F.2d at 1212-1213.

The Court, having concluded that the plaintiffs lack standing, it follows that these cases must be dismissed. Since the ruling on standing is dispositive, the Court need not address the other arguments made by defendants.

Appropriate orders, consistent with this decision shall be entered in each case.

APPENDIX D
STATUTES AND REGULATIONS INVOLVED

THE RULES

I/O Channel Level Interface Standards
Issuance of Federal Information Processing Standards
44 Fed. Reg. 10,098 (February 16, 1979).

On June 19, 1978, notice was given in the FEDERAL REGISTER (43 FR 26341-26344) that three proposed input/output (I/O) channel level interface standards were being recommended for Federal use. The three standards mentioned in that notice were (1) I/O Channel Interface, (2) Channel Level Power Control Interface, and (3) Operational Specifications for Magnetic Tape Subsystems.

Interested parties were invited to submit written comments and, if desired, to testify at a public hearing conducted by the National Bureau of Standards (NBS) regarding those standards. A public hearing was held at NBS on August 11, 1978.

The testimony of the persons who testified at the public hearing, the written comments submitted by interested parties and all other material furnished in connection with those notices have been carefully considered and studied. In addition, the Department has also examined and reviewed its own material relevant to these standards. This examination, study and review has resulted in the preparation of a detailed evaluation and analysis, including a revision and updating of earlier analyses. On the basis of such evaluation and analysis, and pursuant to the authority vested in the Secretary of Commerce (Secretary) under Pub. L. 89-306 (79 Stat. 1127; 40 U.S.C. 759(f)) and Executive Order 11717 (38 FR 12315, dated May 11, 1973), the Secretary has approved those three Federal Information Processing Standards and has authorized

the publication of this notice announcing her approval of the three standards.

A copy of the evaluation documents on which the Secretary's approval was based, including copies of the transcript of the referenced public hearing and the written comments and materials submitted by interested parties, are available for inspection and copying in the Central Reference and Records Inspection Facility, Room 5317, Department of Commerce Building, 14th Street between Constitution Avenue and E Street, NW, Washington, D.C. 20230. This facility is open to the public Monday through Friday between the hours of 9 a.m. and 4:30 p.m. See §4.4(c) of Title 15 of the Code of Federal Regulations for more details regarding the operation of this facility.

These standards define the mechanical, electrical and functional interface specifications for connecting computer peripheral equipment, such as magnetic tape and disk devices, as a part of medium and large scale automatic data processing (ADP) systems. The standards will enable Federal agencies to procure computer peripheral equipment competitively with regard to cost and performance and to be assured that the resulting interconnected equipment will perform correctly as a part of Federal ADP systems. Such competition will be made possible in the procurement of specifically indentified classes of computer peripheral equipment at the time of initial ADP system acquisition, when systems are being augmented, and when system components are being replaced.

The three approved standards are closely interrelated. They together support the fully competitive procurement of magnetic tape peripheral equipment. The first two of these approved standards, together with another standard planned to be recommended to the Secretary for approval in the near future, will enable the fully competitive procurement of magnetic disk peripheral equipment. The I/O Channel Interface standard provides the basic hardware interface structure for transmission of control information and data to and from

peripheral equipment. The Channel Level Power Control Interface standard provides for electrical power control of computer peripheral subsystems. The Operational Specifications for Magnetic Tape Subsystems standard provides the detailed functional interface specifications for use of magnetic tape subsystems connected through interfaces conforming to the first two standards.

Each of the approved Federal Information Processing Standards contain two basic sections: (1) An announcement section which provides information concerning the applicability and implementation of the standard, and (2) a specification section which defines the technical parameters of the standard. Only the announcement section of each of these three standards is provided in this notice.

Interested parties may purchase either paper or microfiche copies of these three standards, including the technical specifications pertaining thereto, from the National Technical Information Service (NTIS). Specific ordering information from NTIS for these standards is set out below in the *Where to Obtain Copies* portion of the announcement section of each of these standards.

The criteria for determination by the National Bureau of Standards of excluded systems, as is required in paragraph one of the *Applicability* section of the I/O Channel Interface standard, will be published in the FEDERAL REGISTER no later than March 19, 1979. It will be accompanied by a description of the procedures to be followed in developing, maintaining, and distributing the required list of currently excluded systems.

Persons desiring any further information about these standards may contact Mr. Thomas N. Pyke, Jr., Director, Center for Computer Systems Engineering, Institute for Computer Sciences and Technology, National Bureau of Standards, Washington, D.C. 20234 (301) 921-3436.

Dated February 12, 1979

ERNEST AMBLER, *Director*

Federal Information Processing Standards Publication 60, I/O Channel Interface. 44 Fed. Reg. 10,099 (February 16, 1979).

Federal Information Processing Standards Publications are issued by the National Bureau of Standards pursuant to the Federal Property and Administrative Services Act of 1949, as amended, Pub. L. 89-306 (79 Stat. 1127), Executive Order 11717 (38 FR 12315, dated May 11, 1973) and Part 6 of Title 15 Code of Federal Regulations (CFR).

Name of Standard. I/O Channel Interface (FIPS PUB 60).

Category of Standard. Hardware Standard, Interface.

Explanation. This standard defines the functional, electrical, and mechanical interface specifications for connecting computer peripheral equipment as a part of automatic data processing (ADP) systems. This standard together with a companion standard for power control, defines the hardware characteristics for the I/O channel level interface. In order to achieve full plug-to-plug interchangeability of peripheral components, device class specific operational specifications standards are also required for each class of peripheral device. These operational specifications standards will be proposed as Federal Information Processing Standards to accompany this standard as they are developed.

The Government's intent in employing this I/O Channel Interface standard is to reduce the cost of satisfying the Government's data processing requirements through increasing its available alternative sources of supply for computer system components at the time of initial system acquisition, as well as in system replacement and augmentation and in system component replacement.

This standard is also expected to lead to improved reutilization of system components. When acquiring ADP systems and system components, Federal agencies shall cite this standard in specifying the interface for connecting computer peripheral equipment as a part of ADP systems.

Approving Authority. Secretary of Commerce.

Maintenance Agency. Department of Commerce, National Bureau of Standards (Institute for Computer Sciences and Technology).

Cross Index. American National Standards Institute document X3T9/600, Rev. 2, Draft Proposed American National Standard for I/O Channel Interface.

Applicability. This standard is applicable to the acquisition of all ADP systems and peripheral equipment for those systems except those minicomputer, microcomputer, and other small scale systems which are specifically excluded by the National Bureau of Standards (NBS). A list of such currently excluded systems and the current criteria for exclusion will be developed and maintained by NBS and will be periodically distributed to all Federal agencies and be publicly available upon request.

This standard is applicable to the acquisition of (1) all new and replacement ADP systems, (2) computer peripheral equipment acquired to replace existing peripheral equipment of or to augment ADP systems that employ interfaces conforming with this standard, and (3) peripheral equipment acquired to replace existing peripheral equipment of or to augment ADP systems that do not conform to this standard, but for which the hardware and software necessary to conform to this standard are commercially available.

Specifically, this standard shall be employed in the interconnection of computer peripheral equipment as a part of ADP systems for the following types of peripherals: (1) Magnetic tape equipment employing open reel-to-reel magnetic tape storage devices, specifically excluding magnetic tape cassette and tape cartridge storage devices, (2) magnetic disk storage equipment employing disk drives each having a capacity greater than 7 megabytes per storage module, specifically excluding flexible disk and disk cartridge devices having a smaller storage capacity per device, and (3)

peripheral equipment employing all peripheral device types for which accompanying operational specifications standards have been issued as Federal Information Processing Standards.

Verification of the correct operation of all interfaces that are required to conform to this standard shall, through demonstration or other means acceptable to the Government, be provided prior to the acceptance of all applicable ADP equipment.

Specifications. This standard incorporates by reference the technical specifications of ANSI document number X3T9/600, Rev. 2. Copies of the technical specifications section of the standard will be available from the National Technical Information Service as described in the *Where to Obtain Copies* section below.

Implementation. The provisions of this standard are effective December 13, 1979. All applicable equipment ordered on or after the effective date, or procurement actions for which solicitation documents have not been issued by that date, must conform to the provisions of this standard unless a waiver has been granted in accordance with the procedure described elsewhere in this standard.

Regulations concerning the specific use of this standard in Federal procurement will be issued by the General Services Administration to be a part of the Federal Property Management Regulations.

This standard shall be reviewed by NBS within three years after its effective date, taking into account technological trends and other factors, to determine whether the standard should be affirmed, revised, or withdrawn.

Waiver. Heads of agencies desiring a waiver from the requirements stated in this standard, so as to acquire ADP equipment that does not conform to this standard, shall submit a request for such a waiver to the Secretary of Commerce for review and approval. Approval will be granted if, in the

judgment of the Secretary based on all available information, including that provided in the waiver request, a major adverse economic or operational impact would occur through conformance with this standard.

A request for waiver shall include: (1) A description of the existing or planned ADP system for which the waiver is being requested, (2) a description of the system configuration, identifying those items for which the waiver is being requested, and including a description of planned expansion of the system configuration at any time during its life cycle, and (3) a justification for the waiver, including a description and discussion of the major adverse economic or operational impact that would result through conformance to this standard as compared to the alternative for which the waiver is requested.

The request for waiver shall be submitted to the Secretary of Commerce, Washington D.C. 20230, and labeled as a Request for Waiver to a Federal Information Processing Standard. Waiver requests will normally be processed within 45 days of receipt by the Secretary. No action shall be taken to issue solicitation documents or to order equipment for which this standard is applicable and which does not conform to this standard prior to receipt of a waiver approval response from the Secretary.

Where to Obtain Copies. Either paper or microfiche copies of this Federal Information Processing Standard, including the technical specifications, may be purchased from the National Technical Information Service (NTIS) by ordering Federal Information Processing Standard Publication 60 (NBS-FIPS-PUB-60), I/O Channel Interface. Ordering information, including prices and delivery alternatives, may be obtained by contacting the National Technical Information Service (NTIS), U.S. Department of Commerce, Springfield, Virginia 22161, Telephone: (703) 557-4650.

Federal Information Processing Standards Publication 61 Channel Level Power Control Interface. 44 Fed. Reg. 10,100 (February 16, 1979).

Federal Information Processing Standards Publications are issued by the National Bureau of Standards pursuant to the Federal Property and Administrative Services Act of 1949, as amended, Pub. L. 89-306 (79 Stat. 1127), Executive Order 11717 (38 FR 12315, dated May 11, 1973) and Part 6 of Title 15 Code of Federal Regulations (CFR).

Name of Standard. Channel Level Power Control Interface (FIPS PUB 61).

Category of Standard. Hardware Standard, Interface.

Explanation. This standard defines the functional, electrical, and mechanical interface specifications for a power control interface for use in connecting computer peripheral equipment as a part of automatic data processing (ADP) systems. This standard, together with a companion standard for I/O Channel Interface, defines the hardware characteristics for the I/O channel level interface.

The Government's intent in employing this Channel Level Power Control Interface standard is to reduce the cost of satisfying the Government's data processing requirements through increasing its available alternative sources of supply for computer system components at the time of initial system acquisition, as well as in system replacement and augmentation and in system component replacement. This standard is also expected to lead to improved reutilization of system components.

When requiring ADP systems and system components, Federal agencies shall cite this standard in specifying the power control interface for connecting computer peripheral equipment as a part of ADP systems.

Approving Authority. Secretary of Commerce.

Maintenance Agency. Department of Commerce, National Bureau of Standards (Institute for Computer Sciences and Technology).

Cross Index. American National Standards Institute document X3T9/666, Rev. 2, Draft Proposed American National Standard Specifications for Power Control Interface.

Applicability. This standard is applicable whenever use of Federal Information Processing Standard I/O Channel Interface (NBS-FIPS-PUB-60) is required.

Verification of the correct operation of all interfaces that are required to conform to this standard shall, through demonstration or other means acceptable to the Government, be provided prior to the acceptance of all applicable ADP equipment.

Specifications. This standard incorporates by reference the technical specifications of ANSI document number X3T9/600, Rev. 2. Copies of the technical specifications section of the standard will be available from the National Technical Information Service as described in the *Where to Obtain Copies* section below.

Implementation. The provisions of this standard are effective December 13, 1979. All applicable equipment ordered on or after the effective date, or procurement actions for which solicitation documents have not been issued by that date, must conform to the provisions of this standard unless a waiver has been granted in accordance with the procedure described elsewhere in this standard.

Regulations concerning the specific use of this standard in Federal procurement will be issued by the General Services Administration to be a part of the Federal Property Management Regulations.

This standard shall be reviewed by NBS within three years after its effective date, taking into account technological trends and other factors, to determine whether the standard should be affirmed, revised, or withdrawn.

Waiver. Heads of agencies desiring a waiver from the requirements stated in this standard, so as to acquire ADP

equipment that does not conform to this standard, shall submit a request for such a waiver to the Secretary of Commerce for review and approval. Approval will be granted if, in the judgment of the Secretary based on all available information, including that provided in the waiver request, a major adverse economic or operational impact would occur through conformance with this standard.

A request for waiver shall include: (1) A description of the existing or planned ADP system for which the waiver is being requested, (2) a description of the system configuration, identifying those items for which the waiver is being requested, and including a description of planned expansion of the system configuration at any time during its life cycle, and (3) a justification for the waiver, including a description and discussion of the major adverse economic or operational impact that would result through conformance to this standard as compared to the alternative for which the waiver is requested.

The request for waiver shall be submitted to the Secretary of Commerce, Washington, D.C. 20230, and labeled as a Request for Waiver to a Federal Information Processing Standard. Waiver requests will normally be processed within 45 days of receipt by the Secretary. No action shall be taken to issue solicitation documents or to order equipment for which this standard is applicable and which does not conform to this standard prior to receipt of a waiver approval response from the Secretary.

Where to Obtain Copies. Either paper or microfiche copies of this Federal Information Processing Standard, including the technical specifications, may be purchased from the National Technical Information Service (NTIS) by ordering Federal Information Processing Standard Publication 61 (NBS-FIPS-PUB-61), Channel Level Power Control Interface. Ordering information, including prices and delivery alternatives, may be obtained by contacting the National Technical Information Service (NTIS), U.S. Department of Commerce, Springfield, Virginia 22161, Telephone: (703) 557-4650.

Federal Information Processing Standards Publication 62 Operational Specifications for Magnetic Tape Subsystems. 44 Fed. Reg. 10,101 (February 16, 1979).

Federal Information Processing Standards Publications are issued by the National Bureau of Standards pursuant to the Federal Property and Administrative Services Act of 1949, as amended, Pub. L. 89-306 (79 Stat. 1127), Executive Order 11717 (38 FR 12315 dated May 11, 1973) and Part 6 of Title 15 Code of Federal Regulations (CFR.)

Name of Standard. Operational Specifications for Magnetic Tape Subsystems (FIPS PUB 62).

Category of Standard. Interface.

Explanation. This standard defines the peripheral device dependent operational interface specifications for connecting magnetic tape equipment as a part of automatic data processing (ADP) systems. It is to be used together with FIPS PUB 60, I/O Channel Interface and FIPS PUB 61, Channel Level Power Control Interface. This standard, together with these two referenced standards, provides for full plug-to-plug interchangeability of magnetic tape equipment as part of ADP systems.

The Government's intent in employing this standard for Operational Specifications for Magnetic Tape Subsystems is to reduce the cost of satisfying the Government's data processing requirements through increasing its available alternative sources of supply for computer system components at the time of initial system acquisition, as well as in system replacement augmentation and in system component replacement. This standard is also expected to lead to improved reutilization of systems components.

When acquiring ADP systems and system components, Federal agencies shall cite this standard in specifying the interface for connecting magnetic tape peripheral equipment as a part of ADP systems.

Approving Authority. Secretary of Commerce.

Maintenance Agency. Department of Commerce, National Bureau of Standards (Institute for Computer Sciences and Technology).

Cross Index. American National Standards Institute document X3T9/780, Rev. 3, Draft Proposed American National Standard Operational Specifications for Magnetic Tape Subsystems.

Applicability. This standard is applicable to the acquisition of all magnetic tape equipment whenever the use of Federal Information Processing Standard I/O Channel Interface (NBS-FIPS-PUB-60) is required.

Verification of the correct operation of all interfaces that are required to conform to this standard shall, through demonstration or other means acceptable to the Government, be provided prior to the acceptance of all applicable ADP equipment.

Specifications. This standard incorporates by reference the technical specifications of ANSI document number X3T9/780, Rev. 3. Copies of the technical specifications section of the standard will be available from the National Technical Information Service as described in the *Where to Obtain Copies* section below.

Implementation. The provisions of this standard are effective December 13, 1979. All applicable equipment ordered on or after the effective date, or procurement actions for which solicitation documents have not been issued by that date, must conform to the provisions of this standard unless a waiver has been granted in accordance with the procedure described elsewhere in this standard.

Regulations concerning the specific use of this standard in Federal procurement will be issued by the General Services Administration to be a part of the Federal Property Management Regulations.

This standard shall be reviewed by NBS within three years after its effective date, taking into account technological trends and other factors, to determine whether the standard should be affirmed, revised or withdrawn.

Waivers. Heads of agencies desiring a waiver from the requirements stated in this standard so as to acquire ADP equipment that does not conform to this standard, shall submit a request for such a waiver to the Secretary of Commerce for review and approval. Approval will be granted if, in the judgment of the Secretary based on all available information, including that provided in the waiver request, a major adverse economic or operational impact would occur through conformance with this standard.

A request for waiver shall include: (1) A description of the existing or planned ADP system for which the waiver is being requested, (2) a description of the system configuration, identifying those items for which the waiver is being requested, and including a description of planned expansion of the system configuration at any time during its life cycle, and (3) a justification for the waiver, including a description and discussion of the major adverse economic or operational impact that would result through conformance to this standard as compared to the alternative for which the waiver is requested.

The request for waiver shall be submitted to the Secretary of Commerce, Washington, D.C. 20230, and labeled as a Request for Waiver to a Federal Information Processing Standard. Waiver requests will normally be processed within 45 days of receipt by the Secretary. No action shall be taken to issue solicitation documents or to order equipment for which this standard is applicable and which does not conform to this standard prior to receipt of a waiver approval response from the Secretary.

Where to Obtain Copies. Either paper or microfiche copies of this Federal Information Processing Standard, including the technical specifications, may be purchased from

the National Technical Information Service (NTIS) by ordering Federal Information Processing Standard Publication 62 (NBS-FIPS-PUB-62), Operational Specifications for Magnetic Tape Subsystems. Ordering information, including prices and delivery alternatives, may be obtained by contacting the National Technical Information Service (NTIS), U.S. Department of Commerce, Springfield, Virginia 22161, Telephone: (703) 557-4650.

[FR Doc. 79-5011 Filed 2-15-79; 8:45 am]

Operational Specifications for Rotating Mass Storage Subsystems; Issuance of Federal Information Processing Standard. 44 Fed. Reg. 50,078 (August 27, 1979).

On January 23, 1979, notice was given in the Federal Register (44 FR 4750-4751) that a standard for Operational Specifications for Rotating Mass Storage Subsystems was being proposed for Federal use. Interested parties were invited to submit written comments concerning this proposed standard to the National Bureau of Standards.

The written comments submitted by interested parties and other material available to the Department relevant to this standard have been reviewed. This examination, study, and review has resulted in a detailed analysis. On the basis of this analysis, together with the analyses completed as a part of the processing of three I/O channel level interface standards, Federal Information Processing Standards Publication (FIPS PUB) 60, 61, and 62 announced as approved standards in the Federal Register on February 16, 1979 (44 FR 10098-10101), and pursuant to the authority vested in the Secretary of Commerce (Secretary) under Pub. L. 89-306 (79 Stat. 1127; 40 U.S.C. 759(f)) and Executive Order 11717 (38 FR 12315, dated May 11, 1973), the Secretary has approved this Federal Information Processing Standard and has ap-

proved the publication of this notice announcing her approval of the standard.

A copy of the evaluation documents on which the Secretary's approval of this standard was based, including copies of the written comments received and their analysis together with comments submitted and analyses completed as a part of the processing of FIPS PUB's 60, 61, and 62, are available for inspection and copying in the Central Reference and Records Inspection Facility, Room 5317, Department of Commerce Building, 14th Street between Constitution Avenue and E Street N.W., Washington, D.C. 20230. This facility is open to the public Monday through Friday between the hours of 9:00 a.m. and 4:30 p.m. See § 4.4(c) of Title 15 of the Code of Federal Regulations for more details regarding the operation of this facility.

This standard defines the peripheral device dependent interface specifications for use of rotating mass storage subsystems, including magnetic disk equipment, connected as a part of automatic data processing (ADP) systems through interfaces that are also in conformance with FIPS PUB 60, I/O Channel Interface, with FIPS PUB 61, Channel Level Power Control Interface. These standards together will enable Federal agencies to procure rotating mass storage computer peripheral equipment competitively with regard to cost and performance and to be assured that the resulting interconnected equipment will perform correctly as a part of Federal ADP systems. Such competition will be made possible in the procurement of this computer peripheral equipment at the time of initial ADP system acquisition, when systems are being augmented, and when system components are being replaced.

This approved Federal Information Processing Standard contains two basic sections: (1) an announcement section which provides information concerning the applicability and implementation of the standard, and (2) a technical specifications section which defines the technical parameters of the

standard. Only the announcement section of this standard is provided in this notice.

Interested parties may purchase either paper or microfiche copies of this standard, including the technical specifications section, from the National Technical Information Service (NTIS). Specific ordering information from NTIS for these standards is set out below in the *Where to Obtain Copies* portion of the announcement section of the standard.

Persons desiring any further information about this standard may contact Mr. Thomas N. Pyke, Jr. Director, Center for Computer Systems Engineering, Institute for Computer Sciences and Technology, National Bureau of Standards, Washington, D.C. 20234, (301) 921-3436.

Dated: August 22, 1979.

ERNEST AMBLER, *Director.*

Federal Information Processing Standards Publication 63 Operational Specifications for Rotating Mass Storage Subsystems. 44 Fed. Reg. 50,078 (August 27, 1979).

Federal Information Processing Standards Publications are issued by the National Bureau of Standards pursuant to the Federal Property and Administrative Services Act of 1949, as amended, Pub. L. 89-306 (79 Stat.1127), Executive Order 11717 (38 FR 12315, dated May 11, 1973) and Part 6 of Title 15 Code of Federal Regulations (CFR).

Name of Standard. Operational Specifications for Rotating Mass Storage Subsystems (FIPS PUB 63).

Category of Standard. Hardware Standard, Interface.

Explanation. This standard defines the peripheral device dependent operational interface specifications for connecting rotating mass storage equipment as a part of automatic data processing (ADP) systems. It is to be used together with FIPS PUB 60, I/O Channel Interface and FIPS PUB 61, Channel

Lever Power Control Interface. This standard, together with these two referenced standards, provides for full plug-to-plug interchangeabiiity of rotating mass storage equipment as a part of ADP systems.

The Government's intent in employing this standard for Operational Specifications for Rotating Mass Storage Subsystems is to reduce the cost of satisfying its data processing requirements through increasing its available alternative sources of supply for computer system components at the time of initial system acquisition, as well as in system replacement augmentation and in system component replacement. This standard is also expected to lead to improved reutilization of system components.

When acquiring ADP systems and system components, Federal agencies shall cite this standard in specifying the interface for connecting rotating mass storage peripheral equipment as a part of ADP systems.

Approving Authority. Secretary of Commerce.

Maintenance Agency. Department of Commerce, National Bureau of Standards (Institute for Computer Sciences and Technology).

Cross Index. American National Standards Institute document X3T9/848, Rev. 2, Draft Proposed Operational Specifications for Rotating Mass Storage Subsystems. This operational specification is in turn supplemented by three draft proposed American National Standards, each of which provides supplemental track format definition and specifies the sense information format and content for a particular class of rotating mass storage devices: 1) American National Standards Institute document X3T9/904 Rev. 1, Draft Proposed American National Standard Class A Rotating Mass Storage Device Specification, 2) American National Standards Institute document X3T9/905 Rev. 1, Draft Proposed American National Standard Class B Rotating Mass Storage Device Specification, and 3) American National Standards In-

stitute document X3T9/906 Rev. 1, Draft Proposed American National Standard Class C Rotating Mass Storage Specification.

Applicability. This standard is applicable to the acquisition of all rotating mass storage equipment whenever the use of Federal Information Processing Standard I/O Channel Interface (NBS-FIPS-PUB 60) is required.

Verification of the correct operation of all interfaces that are required to conform to this standard shall, through demonstration or other means acceptable to the Government, be provided prior to the acceptance of all applicable ADP equipment.

Specifications. This standard incorporates by reference the technical specifications of the following ANSI documents: X3T9/904 Rev. 1, X3T9/905 Rev. 1, and X3T9/906 Rev. 1, and X3T9/848 Rev. 2 except for:

1. Page 6, Change paragraph numbered 1.4.4 to 1.4.3.

2. Page 20, paragraph 2.1, last sentence. Add to the beginning of that sentence—"Attempts to execute . . .".

3. Page 21a, Table 3, Diagnostic Optional Extensions, column entitled "Multitrack off Binary." Enter the following four binary values:

0101 0011
0111 0011
0100 0100
1000 0010

Copies of the technical specifications section of the standard will be available from the National Technical Information Service as described in the *Where to Obtain Copies* section below.

Implementation. The provisions of this standard are effective June 23, 1979. All applicable equipment ordered on or after the effective date, or procurement actions for which

solicitation documents have not been issued by that date, must conform to the provisions of this standard unless a waiver has been granted in accordance with the procedure described elsewhere in this publication.

Regulations concerning the specific use of this standard in Federal procurement will be issued by the General Services Administration to be a part of the Federal Property Management Regulations.

This standard shall be reviewed by NBS within three years after its effective date, taking into account technological trends and other factors, to determine whether the standard should be affirmed, revised, or withdrawn.

Waivers. Heads of agencies desiring a waiver from the requirements stated in this publication, so as to acquire ADP equipment that does not conform to this standard, shall submit a request for such a waiver to the Secretary of Commerce for review and approval. Approval will be granted if, in the judgment of the Secretary based on all available information, including that provided in the waiver request, a major adverse economic or operational impact would occur through conformance with this standard.

A request for waiver shall include: (1) a description of the existing or planned ADP system for which the waiver is being requested, (2) a description of the system configuration, identifying those items for which the waiver is being requested, and including a description of planned expansion of the system configuration at any time during its life cycle, and (3) a justification for the waiver, including a description and discussion of the major adverse economic or operational impact that would result through conformance to this standard as compared to the alternative for which the waiver is requested.

The request for waiver shall be submitted to the Secretary of Commerce, Washington, D.C. 20230, and labeled as a Request for Waiver to a Federal Information Process-

ing Standard. Waiver requests will normally be processed within 45 days of receipt by the Secretary. No action shall be taken to issue solicitation documents or to order equipment for which this standard is applicable and which does not conform to this standard prior to receipt of a waiver approval response from the Secretary.

Where to Obtain Copies. Either paper or microfiche copies of this Federal Information Processing Standard, including the technical specifications, may be purchased from the National Technical Information Service (NTIS) by ordering Federal Information Processing Standards Publication 63 (NBS-FIPS-PUB-63), Operational Specifications for Rotating Mass Storage Subsystems. Ordering information, including prices and delivery alternatives, may be obtained by contacting the National Technical Information Service (NTIS), U.S. Department of Commerce, Springfield, Virginia 22161, Telephone: (703) 557-4630

[FR Doc. 79-26517 Filed 8-23-79; 8:49 am]

I/O Channel Level Interface Standard; Revision of Federal Information Processing Standard. 44 Fed. Reg. 50,079 (August 27, 1979).

On February 16, 1979, notice was given in the Federal Register (44 FR 10098-10101) that the Secretary of Commerce had approved three Federal Information Processing Standards; (1) I/O Channel Interface Standard, (2) Channel Level Power Control Interface, and (3) Operational Specifications for Magnetic Tape Subsystems, designated FIPS Publications (PUB) 60, FIPS PUB 61, and FIPS PUB 62, respectively.

Federal Information Processing Standards Publication 63 (FIPS PUB 63), Operational Specifications for Rotating Mass Storage Subsystems, has been approved by the Secretary with an effective date of June 23, 1979. That standard defines the peripheral device dependent interface specifications for use of rotating mass storage subsystems, including magnetic disk storage equipment, connected as a part of Federal ADP

systems. That standard is to be used with FIPS PUB 60, and FIPS PUB 61 to provide for full plug-to-plug interchangeability of rotating mass storage subsystems. In order to assure the orderly and consistent conformance with these standards by Federal agencies and ADP equipment suppliers, FIPS PUB 60, I/O Channel Interface, should be revised so that its effective date for application to rotating mass storage subsystems is the same as the effective date of FIPS PUB 63. It should be noted that FIPS PUB 61 is applicable whenever use of FIPS PUB 60 is required.

Accordingly, and pursuant to the authority vested in the Secretary of Commerce (Secretary) under Pub. L. 89-306 (79 Stat. 1127; 40 U.S.C. 759(f) and Executive Order 11717 (38 FR 12315, dated May 11, 1973), the Secretary has approved a revision of FIPS PUB 60, I/O Channel Interface, that replaces the first sentence of the "Implementation" section of that standard which reads "The provisions of this standard are effective December 13, 1979," so that it now reads "The provisions of this standard are effective December 13, 1979, except for the provisions of the third paragraph of the section labeled "Applicability" as they apply to rotating mass storage subsystems, including magnetic disk storage equipment, such provisions being effective on June 23, 1979."

Persons desiring any further information about this revision may contact Mr. Thomas N. Pyke, Jr., Director, Center for Computer Systems Engineering, Institute for Computer Sciences and Technology, National Bureau of Standards, Washington, D.C. 20234, (301) 921-3436.

Dated: August 22, 1979.

ERNEST AMBLER, *Director.*

[FR Doc. 79-26518 Filed 8-23-79; 8:49 am]

I/O Channel Level Interface Standards;
Revision of Federal Information Processing Standards.
44 Fed. Reg. 69,316 (December 3, 1979).

On February 16, 1979, notice was given in the Federal Register (44 FR 10098-10101) announcing that the Secretary of Commerce (Secretary) had approved three Federal Information Processing Standards (FIPS): (1) I/O Channel Interface, (2) Channel Level Power Control Interface, and (3) Operational Specifications for Magnetic Tape Subsystems, designated FIPS Publication (PUB) 60, FIPS PUB 61, and FIPS PUB 62, respectively. The provisions of these FIPS were to take effect December 13, 1979.

On August 27, 1979, notice was given in the Federal Register (44 FR 50078-50079) announcing that the Secretary had approved a fourth I/O channel level interface standard, Operational Specifications for Rotating Mass Storage Subsystems, designated FIPS PUB 63. The August 27 announcement was the subject of a correction notice in the Federal Register on August 31, 1979 (44 FR 51294). The provisions of this latter FIPS were to take effect June 23, 1980.

Also on August 27, 1979, notice was given in the Federal Register (44 FR 50079-50080) that the Secretary had approved a revision of FIPS PUB 60, I/O Channel Interface, that replaced the first sentence of the "Implementation" section of that FIPS so that it read "The provisions of this standard are effective December 13, 1979, except for the provisions of the third paragraph of the section labeled "Applicability" as they apply to rotating mass storage subsystems, including magnetic disk storage equipment, such provisions being effective on June 23, 1979." A subsequent Federal Register notice on August 31, 1979, (44 FR 52194) corrected that announcement, so that the above referenced sentence of that FIPS read "*** such provisions being effective on June 23, 1980."

These four I/O channel level interface standards each provide for the issuance of regulations concerning the specific use of these FIPS in Federal procurement. In order to assure

ample time for issuance of the required procurement regulations, revision of FIPS PUB 60, FIPS PUB 61, and FIPS PUB 62 should be made so as to make their provisions effective on June 23, 1980.

Accordingly, and pursuant to the authority vested in the Secretary under Pub. L. 89-306 (79 Stat. 1127; 40 U.S.C. 759(f)) and Executive Order 11717 (38 FR 12315, dated May 11, 1973), the Secretary has approved a further revision of FIPS PUB 60, I/O Channel Interface, that deletes the first sentence of the "Implementation" section of that FIPS and substitutes therefore the following:

"The provisions of this standard are effective June 23, 1980."

Also pursuant to the above cited authority, the Secretary has approved revisions of FIPS PUB 61 and FIPS PUB 62, Channel Level Power Control Interface and Operational Specifications for Magnetic Tape Subsystems, respectively, that deletes the first sentence of the "Implementation" section of each FIPS and substitutes therefore the following:

"The provisions of this standard are effective June 23, 1980."

It should be noted that the results of these revisions will be to make the provisions of FIPS PUB 60, FIPS PUB 61, FIPS PUB 62, and FIPS PUB 63 all effective on June 23, 1980.

Persons desiring any further information about these revisions may contact Mr. Thomas N. Pyke, Jr., Director, Center for Computer Systems Engineering, Institute for Computer Sciences and Technology, National Bureau of Standards, Washington, D.C. 20234, (301) 921-3436.

Dated: November 28, 1979.

ERNEST AMBLER, *Director.*

[FR Doc. 79-37015 Filed 11-30-79; 8:45 am]

Exclusion Criteria And Procedures For Maintaining Exclusion List. 44 Fed. Reg. 16,446 (March 19, 1979).

The approval by the Secretary of Commerce of three input/output (I/O) channel level interface standards was announced in the FEDERAL REGISTER on February 16, 1979 (Vol. 44, No. 34, pp. 10098-10101). Those three standards are:

Federal Information Processing Standards Publication 60, I/O Channel Interface; Federal Information Processing Standards Publication 61, Channel Level Power Control Interface; and Federal Information Processing Standards Publication 62, Operational Specifications for Magnetic Tape Subsystems.

In the first of these standards, it was stated that:

This standard is applicable to the acquisition of all ADP systems and peripheral equipment for those systems except those minicomputer, microcomputer, and other small scale systems which are specifically excluded by the National Bureau of Standards (NBS). A list of such currently excluded systems and the current criteria for exclusion will be developed and maintained by NBS and will be periodically distributed to all Federal agencies and be publicly available upon request.

A primary concern in excluding smaller systems from the requirement to conform with these standards is the cost of using such a complex interface relative to the cost of these smaller systems. Therefore, the exclusion criteria are based on the projected cost to the Government of ADP systems for which these standards are applicable. Accordingly, *ADP systems having a Government purchase price of less than $400,000 in their maximum normally employed configuration are to be incorporated in the initial exclusion list.*

In this context, the "maximum normally employed configuration" includes all system hardware in a "tightly-coupled" system usually enclosed within a single room, but does not include modems or remote terminals. Only those terminals necessary to serve as operator's console(s) are included in the "maximum normally employed configuration." The

cost of operating system software is to be included in the system purchase price, but not that of language processors, applications software, and other system software such as data base management systems.

It should be noted that, if a system is on the exclusion list, *all* configurations of that system — not just the "maximum normally employed configuration" — are exempt from conformance with these interface standards. If, in the process of procuring computer systems or peripherals, a Federal agency receives a bid for a system on the exclusion list and if that system is selected for acquisition, then compliance with these Federal interface standards is not required. The same holds true for the enhancement of previously installed systems which are on the exclusion list.

Use of this type of criteria is intended to simplify the exclusion process with regard to both its maintenance by NBS and its use by Federal agencies and vendors when planning for future ADP systems. The $400,000 threshold will be used by NBS in establishing and updating the exclusion list taking into account all technical, economic, and equipment availability information known to NBS staff.

As a first step in establishing the exclusion list, NBS has developed a proposed initial exclusion list. Any party may obtain a copy of that list by sending a written request to the Director, Institute for Computer Sciences and Technology (ICST), National Bureau of Standards, Washington, D.C. 20234. Written comments regarding the proposed initial list should be sent to the Director, ICST, and must be postmarked not later than May 4, 1979. Following review of these comments, NBS will establish the initial exclusion list and announce the availability of that list in the FEDERAL REGISTER.

Once the exclusion list has been established, all parties will be invited to submit to the Director, ICST, comments or recommendations regarding that list. Comments specifically identifying candidate systems which should be added to or removed from the exclusion list will be especially encouraged.

Such comments should include information supporting the proposed addition or removal. Any comments submitted which are deemed by the sender to contain confidential or proprietary information should be appropriately designated and marked.

NBS will maintain a mailing list of vendors, Federal agencies, and other interested parties to whom copies of the current exclusion list will be sent on a regular basis. Any parties wishing to be included in this mailing list should send a written request to the Director, ICST. Notice of any proposed changes in the exclusion list will be published in the FEDERAL REGISTER and will also be sent to all those on the mailing list. Interested parties will then be allowed forty-five (45) days in which to submit written comments regarding the proposed changes. Following this, NBS will make a determination on the proposed changes and announce that determination in the FEDERAL REGISTER. Written notice of that determination will also be sent to all parties on the mailing list and to any other parties who have otherwise indicated a desire to be so informed.

The exclusion list developed according to the procedures outlined above will be used in conjunction with the applicability provisions of the Federal I/O channel level interface standards. This list and the exclusion criteria are not a part of the standards themselves, but are provided for in the standards.

Dated: March 15, 1979.

ERNEST AMBLER,
Director.

PERTINENT STATUTORY PROVISIONS

Administrative Procedure Act, 5 U.S.C. § 553 (1976)

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or

arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

Administrative Procedure Act, 5 U.S.C. § 702 (1976)

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other that [sic] money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review

or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Administrative Procedure Act, 5 U.S.C. § 706 (1976)

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Brooks Act, 40 U.S.C. § 759 (1976).

§ 759. Procurement, maintenance, operation and utilization of automatic data processing equipment

(a) Authority of Administrator to coordinate and provide for purchase, lease and maintenance of equipment by Federal agencies

The Administrator is authorized and directed to coordinate and provide for the economic and efficient purchase, lease, and maintenance of automatic data processing equipment by Federal agencies.

(b) Procurement, maintenance and repair of equipment; transfer between agencies; joint utilization; establishment and operation of equipment pools and data processing centers; delegation of Administrator's authority

(1) Automatic data processing equipment suitable for efficient and effective use by Federal agencies shall be provided by the Administrator through purchase, lease, transfer of equipment from other Federal agencies, or otherwise, and the Administrator is authorized and directed to provide by contract or otherwise for the maintenance and repair of such equipment. In carrying out his responsibilities under this section the Administrator is authorized to transfer automatic data processing equipment between Federal agencies, to provide for joint utilization of such equipment by two or more Federal agencies, and to establish and operate equipment pools and data processing centers for the use of two or more such agencies when necessary for its most efficient and effective utilization.

(2) The Administrator may delegate to one or more Federal agencies authority to operate automatic data processing equipment pools and automatic data processing centers,

and to lease, purchase, or maintain individual automatic data processing systems or specific units of equipment, including such equipment used in automatic data processing pools and automatic data processing centers, when such action is determined by the Administrator to be necessary for the economy and efficiency of operations or when such action is essential to national defense or national security.The Administrator may delegate to one or more Federal agencies authority to lease, purchase, or maintain automatic data processing equipment to the extent to which he determines such action to be necessary and desirable to allow for the orderly implementation of a program for the utilization of such equipment.

(c) Automatic data processing fund; establishment; uses; report to Office of Management and Budget and Congress

There is hereby authorized to be established on the books of the Treasury an automatic data processing fund, which shall be available without fiscal year limitation for expenses, including personal services, other costs, and the procurement by lease, purchase, transfer, or otherwise of equipment, maintenance, and repair of such equipment by contract or otherwise, necessary for the efficient coordination, operation, utilization of such equipment by and for Federal agencies: ***Provided,*** That a report of equipment inventory, utilization, and acquisitions, together with an account of receipts, disbursments, and transfers to miscellaneous receipts, under this authorization shall be made annually in connection with the budget estimates to the Director of the Office of Management and Budget and the Congress, and the inclusion in appropriation acts of provisions regulating the operation of the automatic data processing fund, or limiting the expenditures therefrom, is hereby authorized.

(d) Capital of fund; credits; transfer of net income to Treasury

There are authorized to be appropriated to said fund such sums as may be required which, together with the value,

as determined by the Administrator, of supplies and equipment from time to time transferred to the Administrator, shall constitute the capital of the fund; *Provided,* That said fund shall be credited with (1) advances and reimbursements from available appropriations and funds of any agency (including the General Services Administration), organization, or contractor utilizing such equipment and services rendered them at rates determined by the Administrator to approximate the costs thereof met by the fund (including depreciation of equipment, provision for accrued leave, and for amortization of installation costs, but excluding, in the determination of rates prior to the fiscal year 1967, such direct operating expenses as may be directly appropriated for, which expenses may be charged to the fund and covered by advances or reimbursements from such direct appropriations) and (2) refunds or recoveries resulting from operations of the fund, including the net proceeds of disposal of excess or surplus personal property and receipts from carriers and others for loss of or damage to property: *Provided further,* That following the close of each fiscal year any net income, after making provisions for prior year losses, if any, shall be transferred to the Treasury of the United States as miscellaneous receipts.

(e) Inapplicability of other inconsistent provisions of law

The proviso following paragraph (4) in section 481(a) of this title and the provisions of section 474 of this title shall have no application in the administration of this section. No other provision of this Act or any other Act which is inconsistent with the provisions of this section shall be applicable in the administration of this section.

(f) Scientific and technological advisory services by Secretary of Commerce; recommendations to President; research

The Secretary of Commerce is authorized (1) to provide agencies, and the Administrator of General Services in the exercise of the authority delegated in this section, with scientific and technological advisory services relating to automatic data

processing and related systems, and (2) to make appropriate recommendations to the President relating to the establishment of uniform Federal automatic data processing standards. The Secretary of Commerce is authorized to undertake the necessary research in the sciences and technologies of automatic data processing computer and related systems, as may be required under provisions of this subsection.

(g) Limitations on authority of Administrator and Secretary of Commerce; notice and review of Administrator's determinations

The authority conferred upon the Administrator and the Secretary of Commerce by this section shall be exercised subject to direction by the President and to fiscal and policy control exercised by the Office of Management and Budget. Authority so conferred upon the Administrator shall not be so construed as to impair or interfere with the determination by agencies of their individual automatic data processing equipment requirements, including the development of specifications for and the selection of the types and configurations of equipment needed. The Administrator shall not interfere with, or attempt to control in any way, the use made of automatic data processing equipment or components thereof by any agency. The Administrator shall provide adequate notice to all agencies and other users concerned with respect to each proposed determination specifically affecting them or the automatic data processing equipment or components used by them. In the absence of mutual agreement between the Administrator and the agency or user concerned, such proposed determinations shall be subject to review and decision by the Office of Management and Budget unless the President otherwise directs.

Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 471 (1976).

§ 471. Congressional declaration of policy

It is the intent of the Congress in enacting this legislation to provide for the Government an economical and efficient system for (a) the procurement and supply of personal property and nonpersonal services, including related functions such as contracting, inspection, storage, issue, specifications, property identification and classification, transportation and traffic management, establishment of pools or systems for transportation of Government personnel and property by motor vehicle within specific areas, management of public utility services, repairing and converting, establishment of inventory levels, establishment of forms and procedures, and representation before Federal and State regulatory bodies; (b) the utilization of available property; (c) the disposal of surplus property; and (d) records management.

Federal Property and Administrative Services Act of 1949, 41 U.S.C. §§ 252-253 (1976).

§ 252. Purchases and contracts for property

(a) Applicability of subchapter; delegation of authority

Executive agencies shall make purchases and contracts for property and services in accordance with the provisions of this subchapter and implementing regulations of the Administrator; but this subchapter does not apply—

(1) to the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration; or

(2) when this subchapter is made inapplicable pursuant to section 474 of title 40 or any other law, but when this subchapter is made inapplicable by any such provision of law, sections 5 and 8 of this title shall be applicable in the absence of authority conferred by statute to procure without advertising or without regard to said section 5 of this title.

(b) Small business concerns; share of business; advance publicity on negotiated purchases and contracts for property

It is the declared policy of the Congress that a fair proportion of the total purchases and contracts for property and services for the Government shall be placed with small business concerns. Whenever it is proposed to make a contract or purchase in excess of $10,000 by negotiation and without advertising, pursuant to the authority of paragraph (7) or (8) of subsection (c) of this section, suitable advance publicity, as determined by the agency head with due regard to the type of property involved and other relevant considerations, shall be given for a period of at least fifteen days, wherever practicable, as determined by the agency head.

(c) Negotiated purchases and contracts for property; conditions

All purchases and contracts for property and services shall be made by advertising, as provided in section 253 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if—

(1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress.

(2) the public exigency will not admit of the delay incident to advertising;

(3) the aggregate amount involved does not exceed $10,000;

(4) for personal or professional services;

(5) for any service to be rendered by any university, college, or other educational institution;

(6) the property or services are to be procured and used outside the limits of the United States and its possessions;

(7) for medicines or medical property;

(8) for property purchased for authorized resale;

(9) for perishable or nonperishable subsistence supplies;

(10) for property or services for which it is impracticable to secure competition;

(11) the agency head determines that the purchase or contract is for experimental, developmental, or research work, or for the manufacture or furnishing of property for experimentation, development, research, or test;

(12) for property or services as to which the agency head determines that the character, ingredients, or components thereof are such that the purchase or contract should not be publicly disclosed;

(13) for equipment which the agency head determines to be technical equipment, and as to which he determines that the procurement thereof without advertising is necessary in special situations or in particular localities in order to assure standardization of equipment and interchangeability of parts and that such standardization and interchangeability is necessary in the public interest;

(14) for property or services as to which the agency head determines that bid prices after advertising therefore are not reasonable (either as to all or as to some part of the requirements) or have not been independently arrived at in open competition: *Provided,* That no negotiated purchase or contract may be entered into under this paragraph after the rejection of all or some of the bids received unless (A) notification of the intention to negotiate and reasonable opportunity to negotiate shall have been given by the agency head to each responsible bidder and (B) the negotiated price is the lowest negotiated price offered by any responsible supplier; or

(15) otherwise authorized by law, except that section 254 of this title shall apply to purchases and contracts made without advertising under this paragraph.

(d) Bids in violation of antitrust laws

If in the opinion of the agency head bids received after advertising evidence any violation of the antitrust laws he shall refer such bids to the Attorney General for appropriate action.

(e) Exception to section

This section shall not be construed to (A) authorize the erection, repair, or furnishing of any public building or public improvement, but such authorization shall be required in the same manner as heretofore, or (B) permit any contract for the construction or repair of buildings, roads, sidewalks, sewers, mains, or similar items to be negotiated without advertising as required by section 253 of this title, unless such contract is to be performed outside the continental United States or unless negotiation of such contract is authorized by the provisions of paragraphs (1), (2), (3), (10), (11), (12), or (14) of subsection (c) of this section.

(f) Carriage of cargo; specification of container size

No contract for the carriage of Government property in other than Government-owned cargo containers shall require carriage of such property in cargo containers of any stated length, height, or width.

41 U.S.C. § 253 (1976).

§ 253. Advertising requirements

Whenever advertising is required—

(a) The advertisement for bids shall be made a sufficient time previous to the purchase or contract, and specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of types of property and services necessary to meet the requirements of the agency concerned. No advertisement or invitation to bid for the carrriage of Government property in other than Government-owned cargo containers shall specify carriage of

such property in cargo containers of any stated length, height, or width.

(b) All bids shall be publicly opened at the time and place stated in the advertisement. Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: *Provided,* That all bids may be rejected when the agency head determines that it is in the public interest so to do.

Ex. Ord. No. 11717. Transfer Of Certain Functions From Office Of Management And Budget To General Services Administration And Department Of Commerce

Ex. Ord. No. 11717, May 9, 1973, 38 F.R. 12315, provided:

By virtue of the authority vested in me as President by the Constitution and Statutes of the United States, particularly by section 301 of title 3 of the United States Code, the Federal Property and Administrative Services Act of 1949, as amended, the Budget and Accounting Act, 1921, as amended, the Budget and Accounting Procedures Act of 1950, as amended, and Reorganization Plan No. 2 of 1970 [set out as a note above], it is hereby ordered as follows:

SECTION 1. There are hereby transferred to the Administrator of General Services all functions that were being performed in the Office of Management and Budget on April 13, 1973 by:

(1) The Financial Management Branch, the Procurement and Property Management Branch, and the Management Systems Branch of the Organization and Management Systems Division; and

(2) the Management Information and Computer Systems Division with respect to policy control over automatic data processing (except those functions relating to the establishment of Government-wide automatic data-processing standards).

SEC. 2. There are hereby transferred to the Secretary of Commerce all functions being performed on the date of this order in the Office of Management and Budget relating to the establishment of Government-wide automatic data processing standards, including the function of approving standards on behalf of the President pursuant to section 111(f)(2) of the Federal Property and Administrative Services Act of 1949, as amended [section 759(f)(2) of Title 40, Public Buildings, Property, and Works].

SEC. 3. (a) The functions transferred to the Administrator of the General Services Administration and to the Secretary of Commerce by this order do not include those performed in connection with the general oversight responsibilities of the Director of the Office of Management and Budget, as the head of that agency and as Assistant to the President for executive management, and the functions transferred by this order shall be performed subject to such general oversight to the same extent that other functions of the General Services Administration and the Department of Commerce, respectively, are so performed.

(b) The functions vested in the President by the first sentence of section 111(g) of the Federal Property and Administrative Services Act of 1949, as amended [section 759(g) of Title 40, Public Buildings, Property, and Works], with respect to fiscal control of automatic data processing activities shall continue to be performed by the Director of the Office of Management and Budget. No function vested by statute in the Director shall be deemed to be affected by the provisions of this order.

SEC. 4. So much of the personnel, property, records and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available, in connection with the functions transferred by this order as the Director of the Office of Management and Budget shall determine, shall be transferred to the Department of Commerce and the General Services Administration, respectively, at such times as the Director shall specify.

SEC. 5. Executive Order No. 11541 of July 1, 1970, is hereby superseded to the extent that it is inconsistent with this order.

SEC. 6. This order shall be effective as of April 15, 1973.

RICHARD NIXON.

APPENDIX E

COMPLAINT OF HONEYWELL INFORMATION SYSTEMS INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No: 79-2715

HONEYWELL INFORMATION SYSTEMS INC,
Honeywell Plaza Minneapolis, Minnesota 55408
Phone: (612) 870-2209, *Plaintiff,*

v.

JUANITA M. KREPS, Secretary of Commerce
14th Street and Independence Avenue, N.W.
Washington, D.C. 20230,

and

ROWLAND G. FREEMAN III, Administrator
General Services Administration
18th and F Streets, N.W.
Washington, D.C. 20405,

and

JAMES T. MCINTYRE, Director
Office of Management and Budget,
17th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20503

and

THE UNITED STATES OF AMERICA, *Defendants.*

COMPLAINT

(For Declaratory And Injunctive Relief)

1. This action seeks a declaratory judgment that four Federal Standards for automatic data processing ("ADP") systems and subsystems ("FIPS PUBS 60, 61, 62 and 63") promulgated by defendant Juanita M. Kreps, the Secretary of Commerce, are arbitrary, capricious, an abuse of discretion, not otherwise in accordance with law and, therefore, null and void. The Standards establish mandatory specifications for all

automatic data processing systems, subsystems and equipment purchased by the Federal government, with the exception of certain specified systems. The Standards are substantially identical to specifications developed and utilized by the International Business Machines Corporation ("IBM"), the dominant manufacturer of ADP systems and equipment in the United States, and will require plaintiff to conform to these IBM specifications as a condition of continuing to do business with the Federal government. The action also seeks preliminary and permanent injunctive relief prohibiting defendants, and their agents, employees and representatives, from requiring compliance with or otherwise enforcing such Standards.

2. The action arises under various laws of the United States, including the Brooks Act, Pub. L. 89-306, 79 Stat. 1127, (40 U.S.C. §759) and the Administrative Procedure Act, 5 U.S.C. §§701 *et seq.*, and under Executive Order 11717, 38 Fed. Reg. 12,315 (May 11, 1973). Jurisdiction is conferred on this Court by 28 U.S.C. §1331 and 5 U.S.C. §702 and venue lies in this district pursuant to 28 U.S.C. §1391(e).

3. Plaintiff Honeywell Information Systems Inc. ("Honeywell"), a wholly-owned subsidiary of Honeywell Inc., is incorporated under the laws of the State of Delaware and has its principal place of business at Minneapolis, Minnesota. Honeywell is engaged primarily in the business of providing a variety of ADP systems, equipment, software, and services to business, industry, and Federal, state and local governments. During 1978, Honeywell sold approximately $92 million in ADP systems and equipment to various Federal agencies.

4. Defendant Juanita M. Kreps, the Secretary of the United States Department of Commerce ("the Secretary"), promulgated the Standards challenged in this action on February 16, 1979 and August 27, 1979 following informal rulemaking proceedings conducted by the National Bureau of Standards ("NBS"). (44 Fed. Reg. 10,098-101; 44 Fed. Reg. 50,078-50,080). The Secretary's decision states that the Standards will be incorporated in the Federal Property Management Regulations ("FPMR") by the General Services Ad-

ministration. However, no such regulations have been issued by the defendant Rowland G. Freeman III, the Administrator of the General Services Administration ("GSA"), and despite plaintiff's requests, no date has been established by GSA for the issuance of such regulations. On August 23, 1979, the Administrator advised plaintiff that because the Standards are "extremely complex" and "far reaching," it was extremely important that "their implementation be carefully considered." Defendants Rowland G. Freeman III, the GSA Administrator and James T. McIntyre, Director of the Office of Management and Budget, are joined in this action because of their actions in violation of the law or failures to act in conformance with the law and because their joinder is necessary to provide plaintiff with its requested relief.

5. At the time the Secretary promulgated the first three of the four Standards challenged herein, the Secretary made them effective on December 13, 1979 and indicated that the proposed fourth Standard, which was only then being subjected to public comment, also would become effective on the same date as the first three Standards. On August 27, 1979, the Secretary announced promulgation of the fourth Standard and stated that it would not be effective until June 23, 1980, despite the fact that the first three Standards were based on analyses which assumed implementation of all four Standards on the same date.

STATUTORY FRAMEWORK FOR THE STANDARDS

6. The Brooks Act, under which the Secretary purported to act in promulgating the Standards, was enacted in 1965 "to provide for the economic and efficient purchase, lease, maintenance, operation, and utilization of automatic data processing equipment by Federal departments and agencies." The Act centralized certain functions related to ADP acquisition in the Administrator of the GSA, but expressly reserved to individual agencies the right to determine "their individual automatic data processing equipment requirements, including the development of specifications for and the selection of the

types and configurations of equipment needed." Subsection (f) of the Brooks Act confers authority on the Secretary of Commerce "to make appropriate recommendations to the President relating to the establishment of uniform Federal automatic data processing standards." 40 U.S.C. §759(f). Subsection (g) provides that the authority conferred upon the Administrator and the Secretary under the Act "shall be exercised subject to direction by the President and to fiscal and policy control exercised by the Bureau of the Budget." The Act contemplated that the Secretary of Commerce would make technical recommendations regarding the establishment of uniform Federal ADP standards, that the Bureau of the Budget would exercise fiscal and policy control with respect to such recommendations, and that the President would make the final determination as to whether such Standards were in the national interest.

7. On December 15, 1966, the Bureau of the Budget ("BOB") issued guidelines with respect to the procedures to be followed by the Secretary in determining whether to recommend Standards. The December 1966 BOB Guidelines required the Secretary to support any recommended standards with, *inter alia,* a statement of purposes to be served by the standards, an assessment of their economic and technological impact, a summary of comments considered in formalizing recommendations, a reference to methods for measuring compliance, areas for recommended application and planning guidance for development of implementation schedules for each Federal agency.

8. On April 30, 1971, the President by letter delegated to the Office of Management and Budget ("OMB"), the successor agency to BOB, the responsibility to act upon any recommendations for Federal ADP standards made by the Secretary under subsection (f) of the Brooks Act. On May 9, 1973, by Executive Order No. 11717, the President transferred to the Secretary of Commerce the responsibilities conferred by him on OMB by the April 30, 1971 letter, including the function of approving standards recommended by the Secretary

pursuant to the Brooks Act. 38 Fed. Reg. 12,315 (May 11, 1973). The Executive Order expressly provided that functions vested by statute in the OMB were not being transferred to the Secretary. In actual fact, the Standards were selected and recommended by the NBS, and neither the Office of Management and Budget nor the President played any part in the decision that the Standards be promulgated.

HISTORY OF THE STANDARDS

9. After enactment of the Brooks Act, a joint government-industry committee, acting under the auspices of the American National Standards Institute ("ANSI"), a nationally recognized standards body, undertook to develop voluntary standards for the connection of peripheral subsystems to central processing units (Interface Standards). When the required consensus on voluntary interface standards could not be obtained, the Secretary commenced an informal rulemaking process under the Administrative Procedure Act, 5 U.S.C. 553, to develop mandatory interface standards.

10. On December 30, 1976, NBS published for comment the first of the four uniform Standards challenged herein. 41 Fed. Reg. 56,877-78. The proposed Standard, designated "I/O Channel Interface" (FIPS PUB 60), was designed to define the functional, electrical and mechanical specifications for attaching peripheral subsystems to a central processing unit. The proposed Standard was based on the specifications used by IBM on its 360 line of computers for approximately 15 years and did not originate with NBS. NBS proposed essentially the specifications previously considered, but not approved, by ANSI for lack of consensus. Plaintiff and virtually every other major ADP systems manufacturer objected to the proposed Standard. On August 22, 1977, the first Standard was published again for comment (42 Fed. Reg. 42,242-43), but the 1977 version of the first Standard, while modified in certain respects, incorporated the same IBM specifications proposed in December 1976 and previously considered, but not approved, by ANSI.

11. The second Standard challenged herein, designated "Channel Level Power Control Interface" (FIPS PUB 61), was published first for comment on March 4, 1977 (42 Fed. Reg. 12,452). It is designed to provide for electrical power control of peripheral subsystems and together with the I/O Channel Interface Standard, the two Standards define the hardware characteristics for the input/output channel level interface. The specifications for the proposed Channel Level Power Control Interface Standard, like the I/O Channel Interface Standard, are substantially identical to those developed and used by IBM. As before, the NBS simply proposed specifications previously considered but not adopted by ANSI. Again, plaintiff and virtually every other ADP systems manufacturer objected to the proposed second Standard.

12. The 1977 versions of the proposed Standards (FIPS PUBS 60 and 61) vested waiver authority in the individual agency heads, as required by the Brooks Act. The 1977 versions also provided that, under certain conditions, individual agencies could procure an ADP system that did not comply with the Standards where the system represented a least-cost alternative for satisfying the agency's ADP requirements. The Chairman of the House Government Operations Committee objected to these aspects of the proposed Standards and urged that the Standards be given universal applicability. The Secretary initially rejected these Congressional objections on the grounds that such universality would restrict the Government's alternatives at time of procurement and reduce competition, but subsequently, as a result of *ex parte* contacts between the employees of the Department of Commerce and the staff of the House Government Operations Committee, the proposed Standards were revised by the Secretary and as revised were published again on June 19, 1978. (43 Fed. Reg. 26,341-44). The two Standards as proposed in 1978 again utilized the IBM specifications published in the 1976 and 1977 versions of the Standards, but, in direct contrast to the 1977 version of the proposed Standards, and without any expressed justification, the 1978 proposed Standards provided for

"universal use" and vested all waiver authority in the Secretary.

13. On June 19, 1978 the Secretary also published for comment the third Standard challenged in this action, designated "Operational Specifications for Magnetic Tape Subsystems" (FIPS PUB 62). The proposed third Standard was designed to provide the detailed operational interface specifications for the use of magnetic tape subsystems connected through interfaces conforming to the first two Standards. These magnetic tape specifications also are virtually identical to those developed and used by IBM.

14. On August 11, 1978, NBS held a public hearing on the first three Standards. Plaintiff's representatives testified at the hearing and also submitted detailed written comments objecting to the Standards on numerous grounds. Virtually every other ADP systems manufacturer and many Federal agencies filed written comments critical of various aspects of the Standards.

15. In December, 1978, Honeywell learned that, in developing its recommendations to the Secretary, NBS was relying on certain critical information which had not been disclosed to plaintiff or any other interested party. This information was used to support NBS' conclusion that, contrary to the position at the public hearing of virtually every ADP systems manufacturer, competition in the ADP mainframe market would not be harmed by promulgation of the Standards, that the Standards were not technologically restrictive and that the costs for nonconforming manufacturers to comply with the Standards would not be significant. Honeywell, and other manufacturers, objected to the agency's reliance on this undisclosed information to no avail.

16. On January 22, 1979, NBS forwarded to the Secretary a Decision Memorandum recommending approval of the Standards and a voluminous package of supporting analyses which were not disclosed to the public. This package was received by the Secretary on or about February 8, 1979,

the Standards were approved without modification on February 9, 1979, and published on February 16, 1979. (44 Fed. Reg. 10,098-101).

17. The Standards promulgated by the Secretary differ from the Standards proposed by NBS on June 19, 1978, only in the postponement from 120 days to 300 days (December 13, 1979) of their effective date after announcement.

18. The Secretary's statement of the basis and purpose of the three Standards consists of a solitary general statement that "[t]he Government's intent in employing [the Standards] is to reduce the cost of satisfying the Government's data processing requirements through increasing its available alternative sources of supply for computer system components at the time of initial system acquisition, as well as in system replacement and augmentation and in system component replacement," and that the Standards also are "expected to lead to improved reutilization of system components." The statement does not provide any other justification for the Standards, nor does it provide the information required by the 1966 BOB Guideline to the Secretary.

19. Concurrent with promulgating the Standards, the Secretary made available the Record compiled by NBS in support of the three Standards, which included, *inter alia,* a Benefit/Cost Analysis, a Technological Impact Assessment, and a document entitled "Summary and Analysis of Comments." These documents had not been published or otherwise disclosed to the plaintiff or any other interested private party before promulgation of the Standards and were not discussed or analyzed by the Secretary.

20. The three Standards require that all ADP systems, except for certain excluded systems, ordered on or after December 13, 1979, or Federal procurement actions on which solicitation documents have not been issued by that date, conform to the Standards. With the exception of the excluded systems, the Standards are "applicable to the acquisition of: (1) all new and replacement ADP systems; (2) computer

peripheral equipment acquired to replace existing peripheral equipment or to augment ADP systems that employ interfaces conforming with this Standard; and (3) peripheral equipment acquired to replace existing peripheral equipment of or to augment ADP systems that do not conform to this Standard but for which the hardware and software necessary to conform to this Standard are commercially available."

21. At the same time, the Secretary also indicated that a fourth Standard, designated "Operational Specifications Standard for Rotating Mass Storage Subsystems" (FIPS PUB 63), which was published for comment on January 23, 1979 (44 Fed. Reg. 4750), would become effective on the same day as the three Standards challenged herein, despite the fact that NBS had stated that comments on the proposed fourth Standard could be submitted until March 30, 1979. (44 Fed. Reg. 10,099). The proposed fourth Standard was designed to provide the detailed operational specifications for the use of rotating mass storage subsystems connected through interfaces conforming to FIPS PUBS 60 and 61. These rotating mass storage specifications are virtually identical to those developed and used by IBM.

22. On March 19, 1979, the Secretary announced that only "ADP systems having a Government purchase price of less than $400,000 in their maximum normally employed configuration" would be excluded from coverage under the Standards and published a proposed list of specific systems meeting this criteria which would be finalized, and later periodically updated by NBS. (44 Fed. Reg. 16,466-67). On June 29, 1979, NBS announced the availability of the initial exclusion list. (44 Fed. Reg. 37,968).

23. On August 27, 1979, the Secretary announced promulgation of the fourth Standard challenged herein, FIPS PUB 63, "Operational Specifications for Rotating Mass Storage Subsystems." (44 Fed. Reg. 50,078-080). The Standard is identical to the one proposed in January, 1979. The statement of the basis and purpose of the fourth Standard is

virtually identical to the statement regarding the first three standards. Although the Secretary initially had stated that FIPS PUB 63 would be effective on the same date as FIPS PUBS 60, 61 and 62, she announced on August 27, 1979 that FIPS PUB 63 would not be effective until June 23, 1980 and that FIPS PUBS 60 and 61, insofar as they apply to FIPS PUB 63, also would not be effective until June 23, 1980. However, FIPS PUBS 60 and 61, insofar as they apply to magnetic tape subsystems (FIPS PUB 62), still will be effective on December 13, 1979.

24. The Standards provide for their incorporation by GSA into the FPMR. However, as alleged in paragraph 4, GSA has acknowledged that the extremely complex and far-reaching nature of the Standards has retarded or frustrated issuance of the necessary regulations. Nevertheless, the first three Standards are still mandated to be effective December 13, 1979. No further review of the Standards by the President, by OMB, by GSA or any other Federal agency, or by any affected industry representatives or companies was provided for in the Secretary's decision.

25. The Standards under challenge are numbers 60, 61, 62 and 63 in the series of uniform ADP standards promulgated by the Secretary known as "FIPS PUBS". Although the Standards specifically cross-index to ANSI documents, the first two Standards were rejected by the ANSI Board of Standards Review ("BSR"), and are the only ADP Standards ever promulgated by the Secretary in the face of an express rejection by the ANSI BSR. The third and fourth standards have never been subject to a vote by the ANSI BSR.

IMPACT OF THE STANDARDS

26. The Standards will have an immediate and serious, detrimental impact on plaintiff and other ADP systems manufacturers. They are based upon and are virtually identical to various specifications developed and used by IBM on various lines of its equipment for over fifteen years. Of the

five reference documents listed as implementation aids for the Standards, four are official IBM publications and the fifth is IBM-oriented. The same Standards have been used by various Japanese manufacturers of similar equipment, and a variant of the first Standard is utilized as a national standard in Japan. These Standards differ substantially from the specifications used by a significant proportion of IBM's United States ADP mainframe and systems competitors, including plaintiff.

27. In 1977, IBM accounted for approximately 67% of the total value of ADP systems and equipment sold by U.S. ADP systems and equipment manufacturers. As of the end of 1977, IBM also accounted for approximately 71% of the total value of U.S. ADP systems and equipment in use. As a direct result of increased competition in the Federal ADP market by plaintiff and other major ADP systems and equipment manufacturers, IBM's share of the ADP systems and equipment owned or leased by the Federal government was reported to be approximately 30%.

28. Plaintiff, as well as a number of other substantial ADP systems and equipment manufacturers, are not now in conformity with the Standards. For various reasons, including their highly complex and far reaching nature, implementation of the Standards will require plaintiff and other equipment manufacturers, not already in compliance, to modify their equipment to conform to the pertinent IBM specifications and to modify systems software, all as a condition precedent to continuing to sell their systems and equipment to Federal agencies.

29. In promulgating the Standards, the Secretary expressly assumed that all systems and mainframe manufacturers supplying ADP systems and equipment to the Federal government not in conformity with the Standards could comply with the Standards by the use of a readily available or easily developed and inexpensive "adaptor." Although this assumption is critical to the Secretary's decision, it does not have any

credible basis in the Record, which, in fact, establishes that development of such an "adaptor" will require great expense, time and effort, and will result in performance degradation for systems using such adaptors.

30. The Standards also do not permit any consideration of the extent of the burden or injury which may be imposed on plaintiff or others whose systems and equipment are architecturally distinct from IBM's systems and equipment. As a result, plaintiff will be required to modify its equipment without regard to the degree to which the differences between its systems and equipment and those produced by IBM have enhanced competition in the relevant market and benefited the Federal government. Consequently, although promulgation of the Standards was objected to by IBM on the grounds that they are technologically regressive, implementation of the Standards will strongly favor IBM and IBM imitators, and will place all nonconforming manufacturers, including plaintiff, at a competitive disadvantage with IBM and IBM imitators to the same extent as would similar action by IBM excluding or inhibiting its major competitors from participating in the Federal ADP market. Indeed, promulgation of the Standards is inconsistent with the long-standing position of the United States in its antitrust action against IBM. *United States* v. *IBM,* 69 Civ. 200 (S.D.N.Y. January 17, 1969). Contrary to the mandate of the Brooks Act and the purpose of the Standards as expressly stated therein, there is no credible support in the Record for the Secretary's conclusions that the Standards will decrease procurement, operation and maintenance costs to the Federal government for ADP systems and equipment or that competition will not be substantially restricted in the already concentrated Federal ADP market.

31. Because of the influence of the Federal ADP market on the ADP industry as a whole, the Secretary's action also is likely to result in adoption of the Standards by other purchasers, particularly state and local procurement agencies.

32. During the past two decades, the U.S. ADP industry has reduced ADP costs to users by providing significant

technological advances. By adopting technology developed by IBM over fifteen years ago and freezing crucial portions of ADP architecture, the Standards ignore technological advances made in recent years. Indeed, even since promulgation of the Standards, new products have been introduced in the U.S. ADP market which will provide significant technical improvements and cost savings to users over existing ADP systems equipment, but which are inconsistent with the Standards. In practical effect, the Standards will materially restrict the selectivity of user agencies and discourage technological improvements in ADP systems and equipment, particularly in such systems and equipment purchased by the Federal government.

33. The United States ADP industry is one of the strongest positive contributors to the U.S. balance of payments. The industry currently exports a substantial volume of ADP systems and equipment primarily because the industry has led the world in the development of advanced computer technology. By stifling technological progress in the U.S. ADP industry and by utilizing a variant of the Japanese national standard, the Standards will have a detrimental impact on the U.S. balance of payments.

INVALIDITY OF THE STANDARDS

34. The Secretary acted in excess of her authority under the Brooks Act and violated the division of functions mandated by the Act by issuing final and binding Standards on her own decision without review on policy and fiscal grounds by OMB or the President.

35. The Secretary's direction to the GSA Administrator to incorporate the Standards in the Federal Property Management Regulations deprives the Administrator of the discretion vested in him by the Brooks Act. In addition, the Administrator's delay in publishing any such regulations because of their extreme complexity and far-reaching effect creates an additional burden for nonconforming systems manufacturers such as Honeywell, who try to comply with the Standards

prior to their effective date, and demonstrates that the Secretary has failed to provide adequate lead time to the industry, as required.

36. The Standards as promulgated by the Secretary violate subsection (g) of the Brooks Act by depriving individual user agencies of the authority to determine their own ADP requirements, including the development of specifications for and the selection of the types and configurations of equipment needed.

37. The Secretary's promulgation of the Standards also was arbitrary, capricious, an abuse of discretion, not rationally supported by the record and not in accordance with law in that the Secretary:

(a) Failed to provide plaintiff and other interested parties a meaningful opportunity to comment on critical information and analyses relied on by the Secretary in reaching her decision to promulgate the Standards;

(b) Permitted *ex parte* contacts between her staff and other parties without disclosing the nature and extent of these contacts, did not base her decision solely on the evidence in the record, yielded to Congressional pressure, conducted a sham hearing, did not make an independent analysis of the record and failed to exercise her independent judgment;

(c) Failed to consider adequately whether the Standards are consistent with the objectives of the Brooks Act, and whether other, less burdensome Standards would better achieve these objectives;

(d) Failed to provide, in the notice of final promulgation of the Standards, an adequate concise statement of the basis and purpose of the Standards and also failed to explain why the Standards are necessary, why they are necessary at this time, why other standards less harmful to the ADP industry were not selected and how the Standards were justified by the Record;

(e) Relied upon a Record, including benefit-cost and technical analyses prepared by NBS, which is defective and

does not rationally support the decision reached by the Secretary;

(f) Failed to conduct a complete and adequate analysis of the Standards' potential impact on competition in the federal ADP market, and in fact, has not shown that promulgation of the Standards will not restrict competition in that market, and particularly in the mainframe and systems market;

(g) Failed to conduct a complete and adequate analysis of, or to consider adequately, the impact upon the United States balance of payments deficit which would result from the Standards;

(h) Failed to conduct an adequate analysis of, or to consider adequately, the impact the Standards would have on technological progress in the ADP industry;

(i) Reserved to herself absolute authority to grant or refuse a waiver from the Standards and failed to provide plaintiff and other affected parties any reasonable means of seeking a waiver; and

(j) Failed to provide plaintiff and other ADP systems and equipment manufacturers reasonable criteria for determining the applicability of the Standards to their systems and equipment and utilized the totally arbitrary figure of $400,000 to determine whether certain systems would be excluded from coverage under the Standards.

38. In order to attempt to comply with the Standards, plaintiff and others similarly situated would be compelled immediately, with no assurance that they will be successful, to devote substantial time to research and development and to incur substantial costs, all of which will have been to no avail if the Standards are declared to be unlawful. Plaintiff would realistically require two to four years to develop and market products conforming to the Standards. A conservative estimate of the cost of bringing only the hardware for plaintiff's large-scale product lines into conformity without sacrificing performance would be approximately $12.5 million. Costs associated with software are more difficult to

quantify, but they would be of similar magnitude. Additional costs would be incurred to make other product lines conform to the Standards. An actual controversy exists between the parties. Plaintiff has exhausted the administrative remedies available to it, has no adequate remedy at law, and will be irreparably injured if the Court does not preliminarily and permanently enjoin defendants from implementing the Standards.

WHEREFORE, plaintiff prays that the Court award judgment as follows:

(1) Declaring that the Secretary's promulgation of the Standards was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law and that the Standards, therefore, are null and void;

(2) Preliminarily and permanently enjoining defendants and their successors, agents and employees and other representatives from implementing the Standards; and

(3) Granting plaintiff such other and further relief as may be just.

Respectfully submitted,

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Date: October 12, 1979

APPENDIX F

LIST OF PARENTS, SUBSIDIARIES AND AFFILIATES OF PETITIONERS

The following is a list of the parent companies, subsidiaries (other than wholly-owned subsidiaries) and affiliates of each of the petitioners.

CONTROL DATA CORPORATION

Computer Peripherals, Inc.
Magnetic Peripherals, Inc.
City Venture Corporation
Credit Francais International S.A.
Union Trust, Incorporated (Kentucky)
Commercial Credit Plan, Inc. (Minnesota)
The City Loan and Savings Company (Ohio)
Commercial Credit Bank of Dallas
Commercial Credit Plan Industrial Loan Company (Virginia)
Commercial Credit Corporation (W. Virginia)
Commercial Credit Plan, Incorporated (W. Virginia)
The Commercial Credit Plan Incorporated of Beckley (W. Virginia)
Commercial Credit Plan Incorporated of Bluefield (W. Virginia)
Commercial Credit Plan Incorporated of Clarksburg (W. Virginia)
Commercial Credit Plan Incorporated of Elkins (W. Virginia)
Commercial Credit Plan Incorporated of Fairmont (W. Virginia)
Commercial Credit Plan Incorporated of Huntington (W. Virginia)
Commercial Credit Plan Incorporated of Logan (W. Virginia)
Commercial Credit Plan Incorporated of Madison (W. Virginia)
Commercial Credit Plan Incorporated of Martinsburg (W. Virginia)
Commercial Credit Plan Incorporated of Mullens (W. Virginia)
Commercial Credit Plan Incorporated of St. Albans (W. Virginia)
Commercial Credit Plan Incorporated of Welch (W. Virginia)

Commercial Credit Plan Incorporated of Wheeling (W. Virginia)
Computer Terminals of Iran
Elbit Computers, Limited
Elrand Ltd. (Israel)
Eltek Limited (Israel)
Institute of Advanced Computer Technology (Philippines)
ROM Control Data S.R.L. (Romania)
Rural Ventures, Inc. (Minnesota)
Servicios Cybernet de Venezuela, S.A.
Relocation Realty Services Corp.

HONEYWELL INFORMATION SYSTEMS INC.

U.S.:

Honeywell Inc.
Cardio-Data Corp.
Enercom, Inc.
General Electric Information Services Company
Honeywell Building Management Services of Colorado, Inc.
Magnetic Peripherals, Inc. (USA)
RZE of America
SESA-Honeywell Communications, Inc.

Non-U.S.:

Arbeitsmedizinische Betreuungsgesellschaft Keiler Betriebe G.m.b.H. (Germany)
CII Honeywell Bull Afrique, S.A. (France)
CII Honeywell Bull Cameroun
CII Honeywell Bull Cote D'Ivoire (Ivory Coast)
CII Honeywell Bull Gabon
CII Honeywell Bull Senegal
CII Honeywell Bull Systems N.V. (Netherlands)
CII Honeywell Bull Systemes (France)
Compagnie CII-HB Internationale N.V. (Netherlands)

Compagnie Internationale Pour L'Informatique-CII Honeywell Bull S.A. (France)
Compagnie Francaise D'Investissements Prives (COFIP) (France)
Correlative Systems International (Belgium)
Data Management S.p.A. (Italy)
Data System, S.A. (Spain)
Embrasid S.A. (Brazil)
Empresa Telematic S.A. (Brazil)
Fed Gesellschaft fur Logistik G.m.b.H. (Germany)
Graphco Industrial Charts Limited (England)
GRS Gesellschaft fur Raketensysteme G.m.b.H. (Germany)
Honeywell and Philips Medical Electronics B.V.
Honeywell Braukmann G.m.b.H. (Germany)
Honeywell Bull, S.A. (Spain)
Honeywell Bull, S.A. (Belgium)
Honeywell Bull Maroc S.A. (Morocco)
Honeywell Bull Madagascar
Honeywell Bull S.A.L. (Lebanon)
Honeywell Controls Pty. Ltd. (Singapore)
Honeywell Europe S.A. Holding K.G. (Germany)
Honeywell India Limited
Honeywell Kuwait K.S.C.
Honeywell-Sime Darby Private Limited (Singapore)
Honeywell-Sistemas de Informacion, S.A. de C.V. (Mexico)
Honeywell Transcontrol Automacao Ltda. (Brazil)
Honeywell Turki-Arabia Limited (Saudi Arabia)
Instituto Studi Direzionali S.p.A. (Italy)
Mexicana Industrial Honeywell, S.A. de C.V. (Mexico)
Montezuma Information Systems SDN.BHD. (Malaysia)
MSI-Honeywell Limited (New Zealand)
NEC Honeywell Space Systems Limited (Japan)
OY Honeywell Bull A.B. (Finland)
Realisations Etudes Electroniques (France)
Sociedade Portuguesa de Computadores Em Tempo Dividido (Time Sharing) S.A.R.L. (Portugal)
Sociedade Portuguesa Honeywell Bull, LDA (Portugal)
Societe de Promotion Commerciale Bull, S.A.R.L. (France)

Societe Internationale Pour L'Innovation (Innovatron) France
Taishin Co., Ltd. (Japan)
United Peripherals Limited (England)
Yamatake & Co., Ltd. (Japan)
Yamatake Engineering Service Co., Ltd. (Japan)
Yamatake-Honeywell Co., Ltd. (Japan)
Yamatake-Honeywell Co., Ltd. Taiwan

SPERRY CORPORATION

New Holland Japan, Inc. (Japan)
Vickers Sperry of India, Ltd. (Joint Venture) (India)

APPENDIX G

Page Eight Of The Transcript Of Proceedings In The District Court On January 3, 1980

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. 79-2715, 2716, 2717 and 2790

HONEYWELL INFORMATION SYSTEMS, INC., *et al, Plaintiffs,*

v.

Juanita M. Kreps, *Defendant.*

TRANSCRIPT OF PROCEEDINGS

January 3, 1980

Washington, D.C.

The above-entitled matter came on for hearing in open court at approximately 10:00 o'clock a.m. before HONORABLE JOHN G. PENN, United States District Judge.

APPEARANCES:

JAMES R. MCALEE, ESQ., HENRY A. HUBSCHMAN, ESQ., MILTON EISENBERG, ESQ., ELDON H. CROWELL, ESQ., HADRIAN R. KATZ, ESQ., appearing on behalf of the plaintiffs.

SCOTT T. KRAGIE, AUSA, DONALD MALONE, ESQ., appearing on behalf of the Defendant.

JUDITH M. MCGINN, CSR
OFFICIAL COURT REPORTER
WASHINGTON, D.C.

* * * *

[*pages 2-7 omitted*]

. . . much with the Federal Government and has so much federal litigation, they said that was a limitation upon this court's role vis-a-vis the other branches of government, the Executive and the Legislative Branches.

Importantly, TAA also answered, we submit definitely several issues which plaintiffs continue to seek to revive in this case.

Earlier in their briefs they argued that injury in fact was sufficient, but TAA, on page 139 of that decision, said that is "clearly incorrect," end quote.

We do not deny that plaintiffs will suffer injury, in fact. Indeed, we have made the point that that is the very object of these regulations. We expect these standards to create a savings of some $60 million for the Federal Government over the next several years. Those savings have to come from somewhere. We expect it to come from increased competition in the peripheral market, and much of those savings will come at the expense of the plaintiffs, and I think obviously that's why we are here.

In their latest opposition, plaintiffs seem to have shifted from the argument that injury is in fact sufficient, to a question of whether injury is direct or indirect.

That's how they tried to distinguish Tax Analysts and Advocates, which as far as I know has not been receded from in any way by our Court of Appeals, that TAA said that

* * * *

Office-Supreme Court, U.S.
FILED
AUG 27 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2175

In the Supreme Court of the United States

OCTOBER TERM, 1980

CONTROL DATA CORPORATION, ET AL., PETITIONERS

v.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Solicitor General

STUART E. SCHIFFER
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QUESTION PRESENTED

Whether manufacturers of automatic data processing equipment have standing under the Brooks Act, 40 U.S.C. 759, to challenge government procurement specifications for such equipment adopted by the Secretary of Commerce pursuant to that Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2175

CONTROL DATA CORPORATION, ET AL., PETITIONERS

v.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is not yet reported. The opinion of the district court (Pet. App. 33a-40a) is reported at 85 F.R.D. 339.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1981. The petition for a writ of certiorari was filed on June 24, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Brooks Act, 40 U.S.C. 759, is reprinted at Pet. App. 70a-73a.

STATEMENT

The Brooks Act, 40 U.S.C. 759, was designed "to provide for the economic and efficient [procurement] * * * of

automatic data processing equipment by Federal departments and agencies." H.R. Rep. No. 802, 89th Cong., 1st Sess. 1 (1965). To this end the Act centralizes certain decisions about the procurement of such equipment in the Administrator of General Services (see 40 U.S.C. 759(a), (b), (d), (g)), the Secretary of Commerce (see 40 U.S.C. 759(f), (g)), the Office of Management and Budget (see 40 U.S.C. 759(c), (g)), and the President (see 40 U.S.C. 759(f), (g)).

Petitioners, three manufacturers of automatic data processing equipment, sued for declaratory and injunctive relief in the United States District Court for the District of Columbia,[1] challenging Federal Information Processing Standards promulgated by the Secretary of Commerce pursuant to the Brooks Act.[2] These standards, which must be followed by government agencies in their procurement unless the Secretary grants a waiver, specify interface requirements for computers' "peripheral equipment, such as magnetic tape and disk devices * * *" (Pet. App. 8a). The standards are intended to enable the government to use one manufacturer's equipment with another manufacturer's system (see *id.* at 6a) and to permit government agencies to exchange equipment among themselves (*id.* at 8a). Petitioners asserted that the Secretary's adoption of the standards violated the Brooks Act by invading the province of other government agencies (Pet. 4-5; Pet. App. 93a-94a), was insufficiently supported by the administrative record (Pet. 5), and was based on material outside the record that

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[1]Burroughs Corporation, a fourth plaintiff, did not join in the petition for a writ of certiorari.

[2]The Brooks Act authorizes the Secretary "to make appropriate recommendations to the President relating to the establishment of uniform Federal automatic data processing standards" (40 U.S.C. 759(f)(2)). The President delegated his authority to issue such standards to the Secretary. Exec. Order No. 11717, Section 2, 38 Fed. Reg. 12315 (1973) (Pet. App. 79a).

was not made available for public comment (*ibid.*). They alleged that the standards injured them by forcing them to modify their equipment, at considerable expense, if they wished to sell it to the government (Pet. App. 36a).

The district court dismissed petitioners' claims. It held that petitioners lacked standing under *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), because the interests they asserted were not arguably within the "zone of interests protected by the [Brooks Act]" (Pet. App. 38a). The court reasoned that the Brooks Act was "merely designed to establish a more economic and efficient system for procurement of data processing equipment by the federal government" (*id.* at 39a). The court stated that it found "nothing in the [Brooks] Act which implies that it was directly or indirectly designed to afford protection for these plaintiffs. * * * Likewise, * * * its legislative history reveals nothing which would suggest an intent by Congress to protect the interests of these plaintiffs" (*ibid.*).

The court of appeals affirmed.[3] Explicitly adopting an approach to congressional intent that was favorable to petitioners (Pet. App. 24a), the court nonetheless found that a "review of the relevant statutory provisions and legislative history reveals *no* evidence of an intent to protect or benefit" petitioners (*ibid.*; emphasis in original). The court explained that "[t]he Brooks Act resulted from a growing perception that certain trends in [data processing equipment] acquisition and use were leading to 'costly inefficiencies.' * * * To avoid these inefficiencies, Congress established in the Act a coordinated management program directed particularly toward the acquisition of [data processing] equipment. * * * [O]nly one end was sought—

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[3]The court of appeals granted petitioners' motion for a stay of the Secretary's standards pending appeal. On July 2, 1980, this Court vacated the stay. 448 U.S. 909.

lower government * * * costs" (*id.* at 25a-26a). Consequently, the court said, "we cannot find that [petitioners'] interest lies within the zone of interests intended to be protected by the Brooks Act" (*id.* at 27a). The court of appeals therefore concluded that petitioners lacked standing to raise their claims.

ARGUMENT

1. In *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), the Court held that in order to have standing to challenge an administrative action, a party must show not only that it was injured in fact by the action (*id.* at 152) but also that the "interest [it seeks] to * * * protect[] * * * is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question" (*id.* at 153).[4]

Petitioners appear to concede that the Brooks Act was not intended to protect the interests they assert and that they are not among the Act's "intended beneficiar[ies]" (Pet. 11). In any event, petitioners point to nothing in the Act suggesting that Congress sought to protect the interests of manufacturers like themselves. Nor do they take issue with the court of appeals' conclusion that the statute and its legislative history contain "*no* evidence" that Congress intended to benefit petitioners.

In fact, the legislative history demonstrates that the Act was a housekeeping measure intended merely to promote "the effective and efficient management" of federal procurement of computer equipment. H.R. Rep. No. 802, 89th Cong., 1st Sess. 2 (1965); see, *e.g.*, *id.* at 1, 23; 111 Cong. Rec. 22825 (1965) (remarks of Rep. Farnum) ("Essentially,

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[4]See also 5 U.S.C. 702, which grants a right of judicial review to persons "suffering legal wrong" because of agency action or who are aggrieved "within the meaning of a relevant statute."

it is an inventory bill which, in addition, provides for coordinating those aspects of management which cannot economically be considered within any one particular agency."); *ibid.* (remarks of Rep. Monagan) (an "attempt to bring efficiency and progress to the operations of our Government"); *id.* at 28205 (remarks of Sen. Jackson) ("[T]his is simply an effort to try to give centralized control to prevent duplication, waste, and inefficiency that has occurred in the use of data processing equipment."); *ibid.* (remarks of Sen. Tower) (The Act "provide[s] for efficient, businesslike, governmentwide, coordinated management of Federal automatic data processing equipment.").[5]

Because they do not, and cannot, contend that Congress arguably intended to protect their interests in passing the Brooks Act, petitioners assert (Pet. 11-13) that the "zone of interests" test allows standing to be conferred even on a party whose interests Congress did not intend to protect. As support for this assertion—which is contradicted by the very language of the test—petitioners rely on *Association of Data Processing Service Organizations, Inc.* v. *Camp* itself, and two somewhat related cases, *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970), and *Investment Co. Institute* v. *Camp*, 401 U.S. 617 (1971). None of these cases supports petitioners' claim that a party may challenge an administrative action even if it is not among those whom the statute in question was intended to protect.

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[5]As the court of appeals remarked, "Congress was determined to obtain an effective * * * interface standard, *despite* [the] * * * possible adverse effects on * * * suppliers such as [petitioners]" (Pet. App. 27a; emphasis added). The court noted that members of Congress were concerned that the industry was deliberately delaying the development of standards because it knew that such a development would adversely affect its interests (*id.* at 27a n.25). This is further evidence that the Brooks Act was not designed to protect petitioners' interests.

These cases involved challenges by banks' competitors to administrative decisions that, the competitors alleged, violated statutes prohibiting banks from engaging in certain non-banking activities. In each case, the Court determined that the statute arguably protected the competitors' interests. In *Data Processing*, the Court explicitly held that the statute in question "arguably brings a competitor within the zone of interests protected by it" (397 U.S. at 156). In *Arnold Tours*, the Court relied on *Data Processing* and held that "[n]othing in [that] opinion limited [the statute] to protecting only competitors [of the sort involved in *Data Processing*]" (400 U.S. at 46). In *Investment Co. Institute*, the Court declared the standing question "foreclosed by *Data Processing* * * *" (401 U.S. at 620; see *id.* at 621). The Court explained that "Congress had arguably legislated against the competition that the [competitors] sought to challenge, and from which flowed their injury" (*id.* at 620), and it rejected Justice Harlan's contention in dissent that the statute in question was not intended to protect the competitors (*id.* at 640).[6] Moreover, in *Barlow* v. *Collins*,

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[6]Some commentators have suggested that *Data Processing*, *Arnold Tours*, and *Investment Co. Institute* should have instead rested on the principle of *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470 (1940). See Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669, 1730-1734 (1975). In *Sanders Brothers*, the Court held that a radio station could challenge an agency's decision to grant a license to a competitor even though the station was not among those parties whose interests were protected by the statute in question (see 309 U.S. at 473-476). The Court appeared to reason that the station acted as a surrogate for the unorganized group of radio listeners, who might lack the incentive to raise such a challenge. See *id.* at 473-477. But the Court in *Data Processing* and its progeny did not rely on *Sanders Brothers*, and petitioners do not invoke the *Sanders Brothers* principle. Unlike the statute involved in *Sanders Brothers* (see *id.* at 477), nothing in the Brooks Act or its legislative history suggests the need for enforcement by surrogates. Moreover, the Brooks Act was not intended to protect the interests of some unorganized class of persons unlikely to be able to defend itself in court; the Act was intended to protect the government's own interest in efficiency. If petitioners are allowed to be

397 U.S. 159 (1970), decided the same day as *Data Processing*, the Court treated the question whether the parties challenging the administrative action were "within the zone of interests protected by the Act" as identical to the question whether "[i]mplicit in the statutory provisions and the legislative history [there] is a congressional intent [to] protect the interests of [those parties or] * * * to benefit [them]" (397 U.S. at 164-165). The courts of appeals have consistently interpreted the "zone of interests" test in this way. See, *e.g., Jarecki* v. *United States*, 590 F. 2d 670, 675 (7th Cir.), cert. denied, 444 U.S. 829 (1979); *American Federation of Government Employees, Local 1668* v. *Dunn*, 561 F. 2d 1310, 1312-1313 (9th Cir. 1977); *Rodeway Inns of America, Inc.* v. *Frank*, 541 F. 2d 759, 765-766 (8th Cir. 1976); *Intercontinental Placement Service, Inc.* v. *Shultz*, 461 F. 2d 222 (3d Cir. 1972).

Finally, petitioners merely assert that a party need not be an intended beneficiary of a statute in order to qualify under the "zone of interests" test (see, *e.g.*, Pet. 11, 13); they do not suggest an alternative formulation of the test or any principle that would limit the class of parties injured in fact by an administrative action who would have standing under their approach. It is abundantly clear from this Court's decisions, however, that in the absence of a clear congressional direction, injury in fact, by itself, is insufficient to confer standing. See, *e.g., Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99, 110 (1979).

"surrogates" enforcing the government's own interest in efficiency, it would appear that every housekeeping statute enacted by Congress could be enforced by any affected party. Nothing in *Sanders Brothers*, *Data Processing*, or any other case supports such a result. Potential government contractors, "to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law." *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 125 (1940); see pages 9-10, *infra*.

2. Petitioners also contend (Pet. 7-10) that the lower courts have not applied the "zone of interests" test in a consistent fashion. But none of the cases cited by petitioners construes the Brooks Act; so far as we can determine this is a case of first impression. Moreover, petitioners have not shown that the interpretation of the "zone of interests" test adopted by any other circuit would be likely to produce a different result in this case.[7] Indeed, in deciding standing issues arising in comparable contexts, other circuits have made it clear that they would reach the same result as the District of Columbia Circuit did here. See, *e.g.*, *Marshall & Ilsley Corp.* v. *Heimann*, No. 80-2251 (7th Cir. June 12, 1981), slip op. 10-21 (citing District of Columbia Circuit decision in this case); *Rhode Island Committee on Energy* v. *GSA*, 561 F. 2d 397, 402 & n.4 (1st Cir. 1977).

In addition, since the evidence is clear that Congress did not intend to protect petitioners or the interests they assert when it passed the Brooks Act, it is difficult to conclude that any court would find that petitioners are "within the zone of interests protected by" the Act (*Association of Data Processing Service Organizations, Inc.* v. *Camp*, *supra*, 397 U.S. at 156). Thus, even if petitioners are correct in asserting that the lower courts are in "disarray" over the proper application of the "zone of interests" test in other areas (Pet. 8, 15), the Court cannot sustain petitioners' position in this case unless it simply abandons the test—a test that the

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[7]For example, in *William F. Wilke, Inc.* v. *Department of the Army*, 485 F. 2d 180 (4th Cir. 1973), the court held that a disappointed bidder could seek relief on the ground that it would have been successful had another bid not been accepted in violation of applicable statutes and regulations. But the court in that case based its holding on the conclusion that the relevant statutes protected the disappointed bidder's "right to reasonable treatment of [its] bid []" (*id.* at 183). The Brooks Act, in contrast, protects none of petitioners' rights or interests. See also Pet. App. 19a-20a (discussing *Merriam* v. *Kunzig*, 476 F. 2d 1233 (3d Cir.), cert. denied, 414 U.S. 911 (1973)).

Court has recently reaffirmed. See, *e.g.*, *Gladstone Realtors* v. *Village of Bellwood, supra*, 441 U.S. at 100 n.6 (1979); *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318, 320-321 n.3 (1977); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 39 n.19 (1976).

3. Finally, petitioners assert that they should be granted standing because otherwise "no one will be able to obtain judicial review of the Secretary's action" (Pet. App. 13-14). But "[t]he assumption that if [a party] ha[s] no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974). Instead, petitioners and others interested in government efficiency have recourse "to the political process" (*ibid.*; see *United States* v. *Richardson*, 418 U.S. 166, 179 (1974)). For at least two reasons, this is a particularly appropriate case in which to apply these principles.

First, as the court of appeals noted in rejecting petitioners' argument, "[s]ince the passage of the Brooks Act, Congress has maintained its interest in [the Act's objectives]. * * * Congress has been quite zealous in its * * * oversight of the * * * Act. It has held numerous hearings and made voluminous criticisms of the agencies' implementations of the Act's provisions and policies in the years since the Act's passage. We find no reason to assume that these congressional efforts will decrease either in vigor or number" (Pet. App. 26a, 28a-29a; footnotes omitted).

Second, statutes setting the terms under which the government will purchase materials are traditionally "not * * * bestowal[s] of litigable rights upon those desirous of selling to the Government [but] * * * self-imposed restraint[s] for violation of which * * * private litigants [] can[not] complain. * * * Judicial restraint of those who administer the Government's purchasing would constitute a

break with settled judicial practice * * *." *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127-128 (1940). See *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 439 n.12 (1980). The Court should not lightly infer that Congress intended to depart from this tradition, and Congress showed no intention whatever of departing from it when it enacted the Brooks Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 80-2175

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONTROL DATA CORPORATION, *et al.*, *Petitioners*,

v.

MALCOLM BALDRIGE, *et al.*, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

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IN THE

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REPLY TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

1. The Brief in Opposition reflects the confusion that currently prevails regarding this Court's zone of interests standing test. That test is concerned with comparing the interest asserted by the party seeking judicial review with the *interests* Congress intended to promote when it enacted the statute in question. Like the court below, the Opposition instead focuses on whether petitioners fall within a class of *persons* that Congress intended to protect.

As the court below found, petitioners have alleged injury to their interest in continuing to compete for federal computer contracts. (Pet. App. 25a; *see also id.* 92a.) The court below further determined that in enacting the statutes in question, the Brooks Act[1] and the Federal Property and Administrative Services Act of 1949,[2]

[1] Pub. L. No. 89-306, 79 Stat. 1127, 40 U.S.C. § 759 (1976).

[2] Ch. 288, 63 Stat. 377 (codified in scattered sections of 40 and 41 U.S.C.).

"Congress recognized maximization of competition as an important means to its objective [of promoting economic and efficient procurement of property]. 41 U.S.C. § 253(a) (1976) and H.R. Rep. No. 802, 89th Cong., 1st Sess. 25 (1965)." (Pet. App. 24a-25a.)[3] Petitioners therefore assert an interest that is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 153.

The interpretation of the zone of interests test applied by the court below, and adopted by the Government in its Opposition (Br. in Opp. 4-7), mistakenly focuses the inquiry upon whether Congress intended to protect petitioners as computer manufacturers, and not upon whether Congress intended to advance the interest in competition for federal contracts. That the Government apparently shares the confusion of the court below regarding the proper interpretation of this Court's standing requirements argues forcefully that the Petition should be granted.

The Government attempts to buttress the analysis of the court below with edited quotations from *Data Processing* and its companion cases, *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 and *Investment Company Institute* v. *Camp*, 401 U.S. 617. However, as noted in the Petition, there was no evidence in the language or legislative history of the banking statutes at issue in those cases that Congress intended to protect the bank competitors who sought judicial review. Rather, the banking statutes were

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[3] The Government is thus incorrect in stating: "Petitioners appear to concede that the Brooks Act was not intended to protect the interests they assert. . . ." (Br. in Opp. 4).

intended to protect the interests of bank depositors. Nevertheless, this Court held that the bank competitors had standing because their interest in being free of competition from banks coincided with Congress' interest in preventing banks from competing in businesses that were not germane to their basic function. Thus, the bank competitors in *Data Processing, Arnold Tours,* and *Investment Company Institute* were not intended beneficiaries of the statutes in question, but were found to have standing.[4]

Petitioners' contention that a party need not be an intended beneficiary of the statute in question in order to have standing does not require that this Court abandon the zone of interests test or adopt "an alternative formulation of the test . . . that would limit the class of par-

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[4] The Government states that the Court in *Investment Company Institute* "rejects Justice Harlan's contention in dissent that the statute in question was not intended to protect the competitors." (Br. in Opp. 6; citation omitted.) There is nothing in the Court's opinion that is inconsistent with Justice Harlan's conclusion that the bank competitors were not intended beneficiaries. Thus, it is more correct to say that the Court conferred standing upon the Petitioners *despite* Justice Harlan's conclusion that Congress did not intend to protect them. The Court's discussion of the zone of interests test shows that its focus was upon the interest asserted by the plaintiffs, and not their identities as parties (401 U.S. at 620):

> . . . [W]e concluded that Congress had arguably legislated against the competition that the Petitioners sought to challenge, and from which flowed their injury.

In *Barlow* v. *Collins,* 397 U.S. 159, the Court found that the legislative history of the statute in question evidenced a congressional intent to protect the interests of cash-rent farmers like the plaintiffs in that case. *Barlow* v. *Collins* thus indicates that an intended beneficiary who has suffered injury in fact does have standing. It cannot be read to restrict standing under the zone of interests test solely to intended beneficiaries of the statute at issue.

ties injured in fact by an administrative action who would have standing. . . ." (Br. in Opp. 7.) There are numerous cases in which parties have been denied standing because the interest they asserted was not related to or was in conflict with the interests that Congress sought to advance in passing the relevant statute. Thus, in *Rhode Island Committee on Energy v. GSA*, 561 F.2d 397 (1st Cir. 1977), a case relied upon by the Government (Br. in Opp. 8), the plaintiffs were denied standing under the zone of interests test because the relevant statute, the Federal Property and Administrative Services Act, was not intended to protect the aesthetic and environmental interests plaintiffs asserted. *Id.* at 401, 402. *See also American Federation of Government Employees Local 1668* v. *Dunn*, 561 F.2d 1310 (9th Cir. 1977), in which the interests of former government employees in continued employment bore no relation to the interests that Congress sought to protect in passing the Service Contract Act, 41 U.S.C. § 351 (1976), which was enacted to protect the interest in maintaining adequate labor standards in the private sector.

Petitioners rely upon the zone of interests test as articulated and applied by this Court in *Data Processing* and its progeny. The interpretation of this test by the court below would unduly restrict judicial review of unlawful agency action to only those parties who are intended beneficiaries of the statute in question, a result not contemplated or required by the *Data Processing* line of cases. This result is particularly troublesome in the context of this case, where the Government has stated that the challenged computer standards were intended to injure petitioners (*see* Pet. 6, n.7).

2. The Government asserts that the courts of appeals have consistently interpreted the zone of interests test as requiring that plaintiffs be intended beneficiaries of the relevant statute. (Br. in Opp. 7). This assertion is flatly contradicted by the decision of the court below, which repeatedly expressed puzzlement over the proper formulation of the zone of interests test and found nothing in the decisions of the courts of appeals that could dissipate its confusion. Indeed, the court below noted that its review of federal court decisions revealed "more variety than uniformity among the approaches to the zone test" and cited six court of appeals decisions that reached three completely disparate interpretations of the test. (Pet. 8.) The Government does not deny that there is disarray among the lower courts in the application of the zone of interests test, that the court below was confused over the proper interpretation of the test, or that this Court has not provided guidance regarding the proper interpretation of the test since the *Data Processing* line of cases, more than ten years ago. All of these factors are persuasive reasons for granting the Petition.

3. The Government apparently concedes that if petitioners are unable to obtain review of the standards at issue, the action of the Secretary of Commerce in promulgating the standards will be completely insulated from judicial review. (Br. in Opp. 9.) The Government reiterates the conclusion of the court below that Congress has been vigilant in overseeing the Commerce Department's computer standards-making program, and that petitioners should accordingly seek redress there. The Government thus overlooks the decisions of this Court holding that there is a strong presumption in favor of judicial review absent clear and convincing evidence of

a Congressional intent to preclude such review. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141, *citing Rusk* v. *Cort*, 369 U.S. 367, 380. There is no such "clear and convincing" evidence here, nor has the Government cited any. Thus, there is no basis for completely insulating the action of the Secretary of Commerce from judicial review.[5]

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[5] In support of the contention that judicial review can be precluded in this case, the Government quotes from *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 137-38. (Br. in Opp. 10.) That case denied standing under procurement statutes to disappointed bidders for government contracts on the basis of the then-extant "legal rights" standing analysis, which was superceded by the passage of section 702 of the Administrative Procedure Act, 5 U.S.C. § 702 (1976) and by this Court's decision in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150. The rationale of *Perkins* v. *Lukens Steel* was that the Court should not meddle in the day-to-day decision making of government procurement officials. Petitioners request no such judicial meddling in this case, but rather seek to challenge far reaching standards promulgated by the Secretary of Commerce that affect all federal procurements of computer equipment and that were promulgated, petitioners alleged, without valid statutory authority, without adequate support in the administrative record, and in violation of the requirements of the Administrative Procedure Act.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE FOR COMPUTER & BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION (CBEMA)

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BRIEF AMICUS CURIAE FOR COMPUTER & BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION (CBEMA)

This brief *amicus curiae* is submitted by the Computer & Business Equipment Manufacturers Association (CBEMA) in accordance with Rule 36.1 of this Court. CBEMA has received written consent from each of the petitioners and respondents to file this brief. The letters of consent from petitioners and respondents have been filed with the Clerk of the Court.

INTEREST OF COMPUTER & BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION (CBEMA)

CBEMA is the trade association which, together with its predecessor organizations, has represented the computer and business equipment industry for the past 65 years. The thirty-eight companies comprising the current CBEMA membership include both small and large manufacturers of computers, data processing and office equipment, and supplies.[1] A number of CBEMA's members provide data processing equipment and services to the federal government. During 1980, CBEMA's members had total industry-related revenues in excess of $50 billion worldwide. Of that total, CBEMA's members received approximately $5 billion from contracts with the federal government.

The members of CBEMA who manufacture computer products consistently have been forerunners in achieving major developments in both the concept and application of computer programming and data processing, and have contributed greatly to the present significant status and role of the computer in modern society. As predicted, the

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[1] The following companies are members of CBEMA: Acme Visible Records, Inc.; AM International, Inc.; AMP Incorporated; Apple Computer Inc.; Bell & Howell, Phillipsburg Division; Burroughs Corporation; Contitronix Inc.; Control Data Corporation; Datapoint Corporation; Dictaphone Corporation; Digital Equipment Corporation; EXXON Enterprises; Eastman Kodak Company; GF Business Equipment, Inc.; General Binding Corporation; Harris Corporation; Hewlett-Packard Company; Honeywell Inc., Micro Switch Division; Honeywell Information Systems, Inc.; IBM Corporation ("IBM"); ICL Incorporated; Lanier Business Products, Inc.; Liquid Paper Corporation; Minnesota Mining and Manufacturing Company; NCR Corporation; Olivetti Corporation; Philips Business Systems, Inc.; Pitney Bowes, Inc.; Remington Rand Corporation; Sanders Associates, Inc.; Sony Corporation of America; Sperry UNIVAC; TRW Incorporated; Tektronix, Inc.; Texas Instruments Incorporated; The Standard Register Company; UARCO Incorporated; and Xerox Corporation.

computer industry has rapidly become the "engine" which assists in running our society [2] and in the future will assist man in numerous areas unrelated to the usual applications of today. Computer uses and applications can be found in almost every field, including medicine, education, law, manufacturing, space exploration, national defense, science, transportation and home management. The tremendous growth in uses for computer technology has taken place in a legal environment largely subject to free market forces conducive to innovation.

CBEMA is also an approved sponsor under the American National Standards Institute [3] for the processing of domestic and international standards relating to information processing, computers and office machines. As an approved sponsor for processing of such domestic and international standards, the members of CBEMA maintain and support extensive activities devoted to development of voluntary industry standards. Prior to adoption of the standards at issue in this case, CBEMA provided the Department of Commerce with extensive testimony and written comments concerning these standards.

Adoption of the mandatory federal government standards for interface devices at issue in this case will have an adverse economic effect upon the growth potential and direction of the computer industry. For that reason, the present case is of vital importance to the entire technological future of our society as well as to CBEMA members in the computer and data processing field. Since the federal government is one of the largest users of computer equipment, resolution of the substantive issues presented by this case will have a significant influence upon

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[2] Binger, *The Computer: Engine of the Eighties, Advanced Management Journal* (January 1967).

[3] The American National Standards Institute is a nationally recognized clearinghouse and sponsor for development of nationally coordinated voluntary safety, engineering and industrial standards.

the immediate and long-term research and development planning of CBEMA members. However, because the Court of Appeals held that petitioners, the parties most directly injured by the allegedly unlawful agency action at issue here, do not have standing to seek judicial review of such agency action, CBEMA members also are vitally concerned with the resultant insulation from judicial review of future agency action by the Secretary of Commerce and other federal agencies.

REASONS FOR GRANTING THE WRIT

I. Resolution of the Standing Issue Presented Is Necessary Because the Court of Appeals Decision Would Immunize Allegedly Unlawful Agency Action From Judicial Review and Have a Significant Adverse Impact Upon Technological Innovation in the Computer Industry.

The practical effect of the Court of Appeals decision denying petitioners standing is to immunize from judicial scrutiny the action taken by the Secretary of Commerce ("Secretary") in this case, as well as future similar action. Since petitioners are the persons most directly injured by the Secretary's action, the Court of Appeals decision necessarily would deny standing to other persons, such as the members of CBEMA, who are affected by the standards [4] and, thus, foreclose any judicial review of the

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[4] The specifications established as mandatory by the Secretary were developed and copyrighted by IBM in the early 1960's. Petitioners' computer systems do not utilize the mandated specifications. Petitioners alleged, and the government conceded, that petitioners will be economically damaged until their systems are brought into compliance. Unlike petitioners, CBEMA's interest in whether the Secretary acted in accordance with statutory authority and followed proper procedures is based on the more generalized impact of the standards in dampening the future growth of the computer industry.

agency action at issue herein. The Court of Appeals asserted that its decision had not "insulated the Secretary's action from critical review" because the Secretary promised to review the standards in three years and because "Congress will interject itself into the process and insist upon the necessary corrective measures." Petitioners' Appendix at 28a. Such observations offer small comfort to petitioners and other affected persons, however, particularly in light of the fact that a principal allegation of petitioners' complaints was that the Secretary's action was not authorized by, and was in violation of, the statute in question. *See* Petitioners' Appendix at 29a. In essence, the Court of Appeals held that the Secretary's action was not subject to *judicial review*, without finding any evidence that Congress intended to preclude such review.

This result does not comport with this Court's settled view that the Administrative Procedure Act "embodies the basic presumption of judicial review" and "manifests a congressional intention that it cover a broad spectrum of administrative actions. . . ." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140-41 (1967). Indeed, the Court of Appeals explicitly stated that it found it "unnecessary" to determine if there was a " 'clear and convincing' indication of a legislative intent to withhold judicial review," even though the practical effect of its decision was to preclude such review. Petitioners' Appendix at 11a. Respondents presented no evidence, however, that Congress intended to immunize the Secretary's computer standards-making process from judicial review. Therefore, Congress implicitly intended that *some* person or class of persons have standing to initiate judicial review of such agency action. Petitioners, as the persons most directly injured, are the logical choice.

Before promulgating the four computer standards establishing mandatory specifications for all major computer

systems purchased by federal agencies, the Secretary was warned by CBEMA and others that the specifications would curtail technological innovation in the computer industry by freezing a basic element of all computer systems. The rules adopted by the Secretary establish mandatory standards for the functional, mechanical and electrical connection between the central processing unit or mainframe of a computer and all peripheral units such as display terminals, keyboards, printers, and disk and magnetic tape storage units. In its comments on the proposed rules, CBEMA questioned the Secretary's choice of specifications developed many years ago by IBM [5] primarily because the input/output interface defines a major aspect of the internal architecture of a computer system. Freezing any major aspect of the internal structure of a computer limits improvements and innovations in computer design. Due to the rapidly changing technology involved, flexibility in the internal architecture of computers is the key element in the continuing quest for reduced costs and improved effectiveness in this vital industry. In addition, continued flexibility in the internal architecture will be an important element in attempting to maintain America's leading position in the international computer marketplace.

In summary, CBEMA opposed the Secretary's adoption of mandatory standards which would likely affect technological innovation, and is vitally concerned about the legality of the Secretary's action. The Court of Appeals narrow interpretation of the manner in which the zone of interests test for standing is applied has altogether precluded judicial scrutiny of that allegedly unlawful action.

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[5] IBM, in its comments on the proposed specifications, also noted that "this interface leaves little room for technological growth." Admin. Rec. at 605.

II. The Requirements for Standing to Obtain Judicial Review of Federal Agency Action Need Clarification by This Court.

A. *The Court of Appeals Indicated the Need for Clarification by This Court of the Zone of Interests Standing Test.*

The Court of Appeals held that petitioners had satisfied the constitutional aspect of the standing inquiry, which requires "that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant . . . ." Petitioners' Appendix at 11a n.6, *quoting Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976). The Court held, however, that petitioners were excluded because of a prudential limitation on standing, which requires that petitioners assert injury to "an interest arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 30a, 11a.

Since the initial appearance of the zone of interests test, in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), this Court has not specified guidelines for applying that test or otherwise attempted to apply it. As a result, there has been a lengthy succession of lower court decisions which reflect a general confusion engendered by the amorphous nature of the test. The Court of Appeals herein briefly surveyed those decisions, finding that some courts "have expressed disagreement with the standard, clearly misapplied it, or virtually ignored it," and also noted that "one commentator has suggested that [the Supreme Court's] neglect indicates the Court's implicit abandonment of the zone standard." Petitioners' Appendix at 21a, 16a, *citing* K. Davis, *Administrative Law Treatise* § 22.02-11, at 509 (Supp. 1976) (footnote omitted). The Court of Appeals herein, however, believed that this Court's "express re-

affirmation of the test's existence, albeit in summary fashion, requires us to assume . . . the test's continued role as a prudential limitation." *Id.* at 16a-17a, *citing Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 n.6 (1979) and other cases.[6]

In attempting to apply the zone of interests test for standing, the Court of Appeals repeatedly noted the importance of reaching the merits of the complaints herein but, nonetheless, denied petitioners standing to do so.

> We recognize that . . . appellants here allege substantial economic loss from the challenged agency action. We acknowledge as well the undoubted public interest in having the Secretary give appropriate attention to the importance of competition in his formulation of I/O interface standards.

Id. at 18a.[7]

CBEMA agrees with petitioners' suggestion that "[t]he assumption of the court below that one must be an intended beneficiary of the statute at issue to assert an interest arguably within the 'zone of interests' of that statute is in conflict with the essential basis of decisions by this Court." [8] Petition at 11. In each of those decisions, this Court held that plaintiffs had standing to challenge agency action under statutes which, if analyzed in terms

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[6] The Court of Appeals stated: "In *Gladstone*, for example, the Court addressed the zone standard in this manner: 'There are other nonconstitutional limitations on standing to be applied in appropriate circumstances.'" *Id.* at 16a n. 12.

[7] Later, the Court stated, "we realize that these observations offer small comfort in the face of the economic injury appellants may suffer . . . ." *Id.* at 29a.

[8] *Investment Co. Institute* v. *Camp*, 401 U.S. 617 (1971); *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970); *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970); and *Barlow* v. *Collins*, 397 U.S. 159 (1970).

of "intended beneficiaries", would have precluded standing. The Court of Appeals "intended beneficiary" approach herein effectively revives the "legal rights" test as the basis of standing, which test "was explicitly disavowed by this Court in *Data Processing*, 397 U.S. at 153." *Id.* at 13. The Court of Appeals, however, emphasized the need for this Court to clarify the manner in which the zone of interests test for standing is applied in stating "we feel our decision is compelled by the present law of standing." Petitioners' Appendix at 29a.

B. *The Zone of Interests Standing Test Should Be Clarified or, in the Alternative, Overruled by This Court.*

Because it denied petitioners standing, the Court of Appeals found it unnecessary to focus on whether Congress clearly intended to withhold judicial review of the Secretary's action. Petitioners' Appendix at 11a n. 7. Thus, the Court of Appeals wooden approach to the question of standing highlights an inherent weakness in the zone of interests standing test which was first recognized in the opinion dissenting from the Court's treatment of the question of standing in both *Barlow* v. *Collins* and *Data Processing*, 397 U.S. at 167.

As Justice Brennan stated:

> Before the plaintiff is allowed to argue the merits, it is true that a canvass of relevant statutory materials must be made in cases challenging agency action. But the canvass is made, not to determine *standing*, but to determine an aspect of *reviewability*, that is, whether Congress meant to deny or to allow judicial review of the agency action at the instance of the plaintiff. The Court in the present cases examines the statutory materials for just this purpose but only after making the same examination during the second step of its standing inquiry. . . .

> The acts do not in terms protect a specific group. But their general policy is apparent; and those whose interests are directly affected by a broad or narrow interpretation of the Acts are easily identifiable. . . .
>
> I submit that in making such examination of statutory materials an element in the determination of standing, the Court not only performs a useless and unnecessary exercise but also encourages badly reasoned decisions, which may well deny justice in this complex field. When agency action is challenged, standing, reviewability, and the merits pose discrete, and often complicated, issues which can best be resolved by recognizing and treating them as such.

397 U.S. at 169-70 (emphasis in original; footnotes omitted).

Had the Court of Appeals correctly interpreted the zone of interests test for standing in light of both the dissenting opinion in *Barlow* and *Data Processing* and this Court's presumption in favor of judicial review, petitioners clearly would have *standing* to challenge the Secretary's action because that action caused them direct injury in fact. The issue of whether Congress clearly intended to withhold judicial review of the Secretary's action required an analysis of the pertinent legislative material that is quite different from the Court of Appeals "intended beneficiary" approach. The governing principle laid down in *Abbott Laboratories* v. *Gardner*, *supra*, is that "judicial review of a final agency action by an aggrieved person will not be cut off *unless there is persuasive reason to believe that such was the purpose of Congress.*" 387 U.S. at 140 (emphasis added).

Had the Court of Appeals followed the principles of *Abbott Laboratories*, the merits of petitioners' challenge would have been reached, since courts are likely to permit review of agency action "particularly . . . when the plaintiff is the only party likely to challenge the action.

Refusal to allow him review would, in effect, commit the action wholly to agency discretion, thus risking frustration of the statutory objectives." *Barlow* v. *Collins*, 397 U.S. at 175 n.9 (concurring and dissenting opinion). Accordingly, the petition for a writ of certiorari herein should be granted so that the Court may consider clarifying the zone of interests test for standing in order to differentiate it from the separate test for reviewability.

In the alternative, the Court may wish to consider specifically repudiating the zone of interests test as a test for standing. In *Continental T. V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977), the Court overruled the holding of *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), which required that alleged vertical restrictions be analyzed in accordance with the *per se* rule of illegality under the antitrust laws. In so doing, the Court stated:

> Although *Schwinn* is supported by the principle of *stare decisis*, . . . we are convinced that the need for clarification of the law in this area justifies reconsideration. . . . Since its announcement, *Schwinn* has been the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts. . . . In our view, the experience of the past 10 years should be brought to bear on this subject of considerable commercial importance.

433 U.S. at 47-49 (footnotes omitted). Likewise, the need for clarification of the standing doctrine justifies this Court's reconsideration of *Data Processing* and its progeny.

CONCLUSION

The decision below effectively immunizes from judicial review allegedly unlawful agency action with widespread adverse effects. This ruling is primarily the result of the disarray and confusion surrounding the zone of interests test for standing. This confusion was both recognized and deplored by the Court of Appeals. The petition for a writ of certiorari should be granted to clarify the requirements for standing to challenge allegedly unlawful agency action or, in the alternative, to reconsider the zone of interests test as a requirement for standing.

Respectfully submitted,

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